THE LOUISIANA JUDICIARY

BY

BEN ROBERTSON MILLER, M.A., LL.B

LOUISIANA STATE UNIVERSITY PRESS
Baton Rouge
1932

THE LOUISIANA JUDICIARY

BY

BEN ROBERTSON MILLER, M.A., LL.B
Sometime Fellow in Government, Louisiana State University
Member of the Louisiana Bar

UNIVERSITY STUDIES
Number 9

LOUISIANA STATE UNIVERSITY PRESS
Baton Rouge
1932

Copyrighted, 1932

By

LOUISIANA STATE UNIVERSITY

TABLE OF CONTENTS

Editor's Note i
Preface ii

PART I.

THE COLONIAL AND TERRITORIAL JUDICIARIES

Louisiana Under France and Spain 1
Louisiana as a Territory of the United States 7

PART II.

UNDER THE CONSTITUTIONS PRIOR TO THE CIVIL WAR

The Constitution of 1812 12
The Constitution of 1845 20
The Constitution of 1852 28

PART III.

THE JUDICIARY DURING THE CIVIL WAR AND RECONSTRUCTION

The Constitution of 1864 35
The Constitution of 1868 44

PART IV.

THE JUDICIARY AFTER RECONSTRUCTION

The Constitution of 1879 58
The Constitutions of 1898 and of 1913 69

PART V.

THE PRESENT JUDICIAL STRUCTURE

The Constitution of 1921 90

PART VI.

JUDICIAL REORGANIZATION

Introduction 107
Judicial Councils 110
Judicial "Rule Making" 116
The Incorporated Bar 118
Judicial Selection and Tenure 120
Structural and Jurisdictional Reforms 123
Miscellaneous Reforms 125
Appendix "A" 128
Table of Cases 130
Bibliography 134
Index 138

LOUISIANA STATE UNIVERSITY STUDIES

JAMES M. SMITH, PH.D.

PRESIDENT, LOUISIANA STATE UNIVERSITY

Edited By

CHARLES W. PIPKIN, PHD., LL.D.

DEAN OF THE GRADUATE SCHOOL AND PROFESSOR OF COMPARATIVE GOVERNMENT, LOUISIANA STATE UNIVERSITY

LOUISIANA STATE UNIVERSITY STUDIES

No. I. The Community Property System of Louisiana with Comparative Studies

BY

HARRIET SPILLER DAGGETT, M.A., LL.B., J.S.D.

Professor of Law, Louisiana State University

No. II. Land Problems and Policies in the African Mandates of the British Commonwealth

BY

NICK P. MITCHELL, Jr., M.A.

Sometime Instructor in Government, Louisiana State University

No. III. The Recognition Policy of the United States Since 1901

BY

TAYLOR COLE, M.A.

Associate Professor of Government, Louisiana State University

No. IV. A Study in the State Government of Louisiana With Special Reference to the Legislative, Executive and Administrative, and Judiciary Departments and the Taxation System

BY

MELVIN EVANS, M.A.

Department of Government, Louisiana State University

No. V. Louisiana—French

BY

WILLIAM A. READ, PH. D.

Professor of English Language and Literature, Louisiana State University

No. VI. Some Phases of Fair Value and Interstate Rates

BY

JAMES BARCLAY SMITH, LL.B., J.S.D

Professor of Law, Louisiana State University

No. VII. Tenure of High School Teachers in Louisiana

BY

IRVING P. FOOTE, PH. D.

Professor of Elementary Education, Louisiana State University

No. VIII. Public Opinion and the Spanish-American War: A Study in War Propaganda

BY

MARCUS M. WILKERSON, PH. D.

Associate Professor of Journalism, Louisiana State University

No. IX. The Louisiana Judiciary

BY

BEN R. MILLER, M.A., LL.B

Sometime Fellow in Government, Louisiana State University

EDITOR'S NOTE

IN THE midst of the skepticism and cynicism directed at all governmental institutions one may say that the founders of state and nation builded well when they constructed their judicial systems. Criticisms have been too frequently based upon vague and ideal norms, if upon any at all, rather than in terms of possible alterations. But the ox-cart age is gone, and the accumulation within recent years of a growing list of complaints and a growing suspicion cannot be longer ignored, unless the American distrust of legislative bodies is to find a counterpart in a no less pronounced American distrust of judicial agencies.

The so-called mal-administration of justice in this country, or in any other, will find no final cure in any ideal judicial structure or in any ideal code of laws. There will never be a "government of laws and not of men." The human factor will always remain as an imponderable, with education as the greatest power for social control. Still changes in the judicial structure of a state can make for a more effective means through which justice can be administered.

The most feasible approach to the problem, it would appear, is to build upon foundations and practices which have commended themselves in the past and to adjust these foundations to the conditions of our modern complex civilization. It is for this reason that a monograph, tracing on the one hand the historical antecedents of Louisiana's present judicial organization and on the other some of the recent developments in other states, may prove of value. In terms of the past of one state and of the present in other states can one best evaluate the existing judicial structure in Louisiana and plan for the future.

Mr. Miller has rendered a real service to his fellow members of the Louisiana Bar and to all students of Louisiana government. His straightforward story of the judicial structure of Louisiana and its changes will add to the available material in this important field a work of sound learning and accurate information.

CHARLES W. PIPKIN.

PREFACE

ANY study which runs the gamut of the history of a state must always leave a great deal unsaid. And, in particular, does this observation hold true for a history of the judicial structure of a state. In this study an attempt has been made to trace the development of the judicial structure of Louisiana and to submit certain suggestions looking toward its reorganization. Only brief attention has been given to the colonial judiciaries and a passing mention of the judicial structure in the Territory of Orleans. Throughout little emphasis has been placed upon the historical explanation of structural changes so much as upon a comparative analysis of the actual changes themselves.

The critical and considerate efforts of Professor Taylor Cole, of the Department of Government, and Professor Charles W. Pipkin, Dean of the Graduate School of Louisiana State University, have been of real assistance. To Professor Arthur T. Prescott, of the Department of Government, Professor Wendell H. Stephenson, of the Department of History, and Mr. Daniel A. Wogan, of the Department of Romance Languages, I am under obligations. To those of my fellow and far more experienced members of the Louisiana Bar who kindly made suggestions, I am grateful. And, especially, does my indebtedness extend to the Honorable Walker B. Spencer of the New Orleans Bar. My sincere appreciation is given to the Board of Editors of the *Tulane Law Review* for permission to incorporate in this *Study* my article on "Judicial Reorganization," which was first printed in the *Review*.

BEN R. MILLER.

Baton Rouge, October 3, 1932.

PART I

THE COLONIAL AND TERRITORIAL JUDICIARIES

Louisiana Under France and Spain

The Customs of Paris, the Edicts of the French Kings, the Royal Schedules of Spain and the Siete Partidas have all greatly influenced what is today our "Civil Law" system in Louisiana. This study represents, however, not an attempt to deal with the development of principles of law but, rather, an attempt to treat the development of the judicial organization and the structure of the courts which have administered these principles. In the matter of organization, the present judiciary of Louisiana has not been strikingly affected by the interesting period during which Louisiana was a colony of France or Spain, yet a brief résumé of the types of courts during those periods should perhaps be made.

Not until the Grant to Anthony Crozat, on September 26, 1712, of "all the territory possessed by the Crown, between old and new Mexico and Carolina," did Louisiana have a judicial system separate from that of New France or, for that matter, much beyond the personal rule of the explorers. This Charter provided that the edicts and ordinances of the realm and the Customs of Paris were to have effect in the territory. A temporary civil government was outlined in the Edicts of December 18 and 23, 1712, creating a *Superior Council* for the territory, with both administrative and judicial powers.[1] This temporary structure was superseded by a reorganized Superior Council created under a "perpetual and irrevocable" Edict of September 16, 1716.[2] This Council was composed of the Governor-General and the Intendant of New France, the Governor of the Territory of Louisiana, a Senior Councillor, the King's Lieutenant, two puisne Councillors, an Attorney General (Procureur-General) and a Clerk.[3]

This Superior Council had the powers possessed by those of the other colonies of France and acted principally as a

---

[1] Edicts of December 18, and 23, 1712, translations, Henry Plauche Dart, *The Legal Institutions of Louisiana*, pp. 3 and 4, reprinted from *Southern Law Quarterly*, November, 1918, Vol. 3, No. 4, pp. 281-292.

[2] Edict of September 16, 1716, translation, *ibid*, pp. 10, 11 and 12; Francois Martin, *History of Louisiana* (Howe's Edition—1882), pp. 114-116.

[3] *Idem.*

court of last resort for all criminal and civil cases, without cost to litigants. Monthly sessions were held. The Intendant of New France was the honorary President of the Council, but the Senior Councillor was President in fact. This latter official acting alone sat as a Court of First Instance (general trial court) in all provisional matters, all other matters being acted upon by the Council *en banc*. In civil cases the necessary quorum was three, while in criminal cases the quorum was five. In the event of temporary vacancies in the Council for lawful cause, members *ad hoc* were chosen by the remaining members from among the "notables" of the territory.[4]

Upon the surrender by Crozat of his Charter and the rise of his successor, the Western Company, also known as the Mississippi Company, a slight change occurred in the judicial structure. This latter company was authorized to appoint and remove inferior judges and officers,[5] marking the first appearance in the territory of judicial officers inferior to the Council. Civil suits to which the Company was a party litigant were to be brought in the Consular Jurisdiction of Paris. Its decisions below a certain amount were to be final, but a devolutive appeal would lie to the Parliament of Paris if larger sums were involved.[6]

The development of the colony soon necessitated a reorganization of the Council and the dispersement of justice into the several parts of the territory. Hence, by an Edict of September, 1719, the Superior Council was to be composed of such directors of the Company as might be in the province, the Commandant-General of the colony (an office in lieu of Governor), the King's two lieutenants, three Councillors, an Attorney-General and a Clerk. No appeal lay of right from the decrees of the Council, but a review might be granted by the King as a matter of grace; appeals would lie from inferior courts to the Council, and no bond was required of the appellant, but the appellee, by giving bond, could provisionally execute the judgment appealed from.[7]

For the administration of justice in scattered parts of the territory, the Directors of the Company or its agents, to-

[4] Edict of September 16, 1716, in Dart, *op. cit.*, pp. 10, 11 and 12; Martin, *op. cit.*, Ch. VIII, *passim*.
[5] Dart, *op cit.*, p. 10; Martin, *op. cit.*, p. 126.
[6] *Idem*.
[7] Edict of September 12, 1719, translation, in Dart, *op. cit.*, p. 15; Martin, *op. cit.*, p. 132.

gether with two of the local "notables," constituted an inferior tribunal for civil cases, while in criminal cases four local "notables" were thus called in. In 1721 or 1722 the colony was divided into nine districts, and in each a local military commander and an inferior judge were assigned for duty. From the decisions of these inferior judges a review could be had, of course, in the Superior Council.[8]

Still another change soon became necessary as the province grew and New Orleans became settled. The increase in small and sundry civil cases in the city of New Orleans necessitated the delegation of two members of the Council to sit once or twice a week as an inferior trial court for such claims involving not in excess of 100 livres (about $22.00).[9]

The Western Company, having had scant success, abandoned its Charter in January, 1732. During the fourteen years of its control, however, the population had grown from seven hundred to five thousand white persons and from twenty to two thousand negroes. New Orleans, founded in 1718 by Bienville, had been made the seat of government in 1722 and was prospering. France received possession of Louisiana again upon the surrender of the Company's Charter, and, hence, a new governmental organization was necessary. By letters patent of May 7, 1732, the Superior Council was again reorganized and composed of the Governor-General of New France, the Governor of the province, the Commissaire-Ordonateur of the province, the King's two lieutenants, the town Mayor of New Orleans, six councillors, an Attorney-General and a Clerk. Increased litigation resulted in authorization from the Crown for the appointment of four *assessors* to whom the Council would refer certain cases in the first instance. These assessors would likewise serve in the Council, when necessary to complete a quorum, but would only give a "casting" vote.[10]

Only brief mention shall be made of the bitter wars between France and England during this period, temporarily halted by the Peace of Aix La Chapelle, October 18, 1748, but which broke out anew in 1754. Spain allied with France early in 1762, in consideration for which France, by a secret

[8] Charles Gayarré, *History of Louisiana* (New Orleans—1903), Vol. I, p. 273.
[9] Edict of December, 1725, in Dart, *op. cit.*, p. 25; Martin, *op. cit.*, p. 155.
[10] Dart, *op. cit.*, pp. 29-31; Martin, *op. cit.*, p. 170.

treaty of November 3, 1762, ceded to her the part of Louisiana lying on the west side of the Mississippi river, together with the city of New Orleans. The Treaty of Paris, February 16, 1763, stripped France of all her remaining possessions in North America, and Spain lost that portion of her territory to the east and south-east of the Mississippi river excepting the city of New Orleans.[11]

The distress of the colonists when the news reached them in October, 1764, of the prospective change in government, the growing resentment in the almost two year interim before the arrival of Don Ulloa to take possession of New Orleans for Spain, the revolt against Ulloa when he finally arrived, all form a fascinating picture in the romantic history of the period. The arrival of Don Alexander O'Reilly, July 24, 1769, charged with quelling the revolt and authorized "to establish in this new part of the King's dominions with regard to the military force, police, administration of justice and finance, such a form of government as might most effectively secure its dependence and subordination, and promote the King's service and the happiness of his subjects," marked a new epoch in the civil and judicial history of the territory.[12]

O'Reilly, after cruelly punishing the leaders against Ulloa, abolished the Superior Council, and his proclamation of November 21, 1769, marked the end of the French and the beginning of the Spanish governmental systems. In place of the Superior Council a Cabildo was established, to be composed of six perpetual Regidors, two Ordinary Alcaldes, an Attorney-General-Syndic and a Clerk.[13]

The office of Perpetual Regidor was acquired by purchase, as was that of Clerk. Among the six Regidors were to be distributed the following offices:[14]

(1) *Alferéz Real* (Royal Standard Bearer), whose duties were mainly honorary.

(2) *Principal Provincial Alcalde,* who was to have cognizance of offenses committed in the city of New Orleans.

(3) *Alquazil Mayor* (High Sheriff), who executed all processes from the various tribunals.

(4) *Depositary-General* (Receiver of fines).

[11] Martin, *op. cit.*, Ch. XIV, *passim.*
[12] *Ibid.*, chs. XIV and XV, *passim.*
[13] *Idem.*
[14] *Ibid.*, Ch. XV, *passim.*

The two *Ordinary Alcaldes,* serving in the *Cabildo,* were chosen on the first of each year by the *Perpetual Regidores,* and an unanimous vote was necessary for selection, although, after a two year service, a majority vote would re-elect. Each of these Alcaldes was a judge within the city of all civil cases, and of all criminal cases in which the defendant did not enjoy and claim the privilege of trial by the *fuero militar* (military judge) or by the *fuero ecclesiástico* (ecclesiastical judge). If the case involved less than the then equivalent of $20.00, the trial before the *Ordinary Alcalde* was summary and final. If the case involved more than 90,000 maravedis ($330.88), an appeal would lie of right to the Cabildo. This appeal would be heard by a court of three, composed of two of the Perpetual Regidores and the trial Alcalde. A majority of these three could affirm or reverse the decision.

There were throughout the colony, as has been noted, *fueros ecclesiásticos* under the direction of a Vicar-General, one of the principal provincial officers. In every parish outside New Orleans *fueros militar,* assisted by *syndics,* served as inferior courts with jurisdiction similar to that exercised by the Ordinary Alcaldes within the city. These military judges transcribed the testimony in cases involving more than $20.00 and transmitted it to the Governor-Intendant who then sent it to the proper tribunal for decision. In addition, these judges in the outlying territory acted as notaries, exercised certain powers in provisional matters and executed judgments rendered against residents of their particular parish.[15]

The development of the city of New Orleans caused Baron de Carondelet, who became Governor-Intendant on January 1, 1792, to announce additional provisions pertaining to the judiciary in his *bando de buen gobierno* (inaugural proclamation). He divided New Orleans into four wards, and an *Alcalde de Barrio* (Commissary of Police) was to be appointed in each ward. These, in addition to their police duties, were to have cognizance of certain suits for small debts. The continued development of the colony necessitated the addition of six new Regidores to the Cabildo in 1797.[16]

---

[15] *Idem.* For comment on the functions of these, see *Meuillons Heirs,* 3 Martin (Old Series), pp. 97-115, decided June, 1813.

[16] Martin, *op. cit.,* pp. 264-270.

A flag of France was to again wave over Louisiana, whose turbulent history as a colony of a European power was not yet ended. Spain agreed to retrocede Louisiana to France by the Treaty of San Idelfonso, November 7, 1801, and the cession was effected March 21, 1802. The principal officers of government under France were to be:[17]

(1) A Captain-General, who, beside the power usually exercised by the Governor-General under the former governments by France, was empowered to suspend provisionally the execution of laws, in whole or in part, after consultation with either one or the other of the two additional principal officers, as the nature of the case governed.

(2) The Colonial-Prefect, who was exclusively charged with the police of the colony and who was in general to exercise all the powers formerly exercised by Intendants, Commissaires-General and Commissaires-Ordonnateur.

(3) The Commissary of Justice, who had the superintendence of all courts of justice and their ministerial officers. He was to make rules for the courts, he could preside and vote in any, and he was to require monthly reports from all. He was to prepare a civil and a criminal code for the deliberation of the other two principal officers. A *proces verbal* of these deliberations was to be then attached to the prepared codes and submitted to the Minister of France for ratification.

The colonists did not learn of this new form of government until the arrival of Laussat, the Colonial Prefect, on March 26, 1803. The actual operation of the new system was limited because Louisiana remained a colony of France only a very short period after its retrocession from Spain. Barbee Marbois, April 30, 1803, as First Consul of France, ceded Louisiana to the United States,[18] and on October 7, Congress accepted the cession, authorizing President Jefferson to take possession and to vest temporary military, civil and judicial powers in such person or persons as he might select.[19] W. C. C. Claiborne, Governor of the Mississippi Territory, and General James Wilkinson were appointed by President Jefferson as Commissioners for these purposes. The former was empowered to exercise provisionally all the

[17] *Ibid.*, pp. 289-290.
[18] Francis Newton Thorpe, *American Charters, Constitutions, and Organic Laws, etc.* (Washington—1909), Vol. III, pp. 1859-1862.
[19] *Act of the 8th Congress*, 1st Session, approved October 31, 1803, *ibid*, p. 1864.

powers formerly exercised by the Governor-General and Intendant, save as to land grants.[20]

Laussat received formal possession of the province from Spain on November 30, 1803, preparatory to its transfer to the United States. On that same day Laussat substituted in lieu of the Cabildo a Municipality, composed of a Mayor, two adjoints and ten members, together with a Secretary and a Treasurer. This temporary arrangement left Louisiana without an officer or tribunal having judicial functions.

The romantic but troubled history of Louisiana as a foreign colony formally ended with the solemn acceptance by Claiborne and Wilkinson of delivery for the United States from Laussat, December 20, 1803. Under France, the virgin territory had been explored and settled, while its growth and development had been occasioned under both France and Spain. From government and the administration of justice by the explorers, tribunals had been established and gradually extended. Given anglicized names the judicial tribunals under France would bear at least a faint resemblance to present day judicial organs. The influence of the Spanish structure was felt for some time as our early parish courts were strikingly similar to the *fueros militar*.

As a Territory of the United States

Although they had been vested with almost dictatorial powers, Claiborne and Wilkinson no doubt realized that Louisiana was peopled with a race accustomed to a legal system foreign to the states in the then Federal Union. Hence an immediate transition in the judicial structure was not attempted.

At the time of the cession there were commandants in each parish of the province and each commandant had a number of syndics. This body of officials performed practically all judicial functions. Claiborne early announced that in general the former officials were to temporarily continue in the exercise of their functions so that the administration of justice might not be suspended.[21]

As for New Orleans, Laussat, it will be remembered, had substituted a municipal body instead of the Cabildo, and the offices of principal, provisional and ordinary alcaldes no

[20] *Ibid.*, pp. 1875-1876.
[21] Martin, *op. cit.*, p. 819.

longer existed there. New Orleans, therefore, had no officer or tribunal with judicial powers or functions save Claiborne himself and the former *alcaldes de barrio.* To remedy this deficiency Claiborne, on December 30, 1803, established a *Court of Pleas,* composed of seven judges. This court was vested with civil jurisdiction in cases involving not in excess of $3000.00, subject to an appeal to the Governor of the territory if involving in excess of $500.00. Its criminal jurisdiction was limited to the infliction of a fine of not more than $200.00 and imprisonment for not more than sixty days. Each of the seven justices individually possessed summary jurisdiction over debts below $100.00, subject to an appeal to the court *en banc.*[22] It may be said that "it appears the Governor retained original jurisdiction in all civil and criminal matters, save as qualified, and also certain appellate jurisdiction over the Court of Pleas."[23]

By Act of Congress, March 26, 1804, the territory of Louisiana was divided and all that portion south of the Mississippi territory and of "an east and west line to commence on the Mississippi River at the 33° of north latitude, and to extend west to the western boundary of the said cession" was termed "Orleans."[24] The residue was termed the "District of Louisiana," but no part of it is included in present day Louisiana.[25] In providing for the government of this territory of "Orleans," judicial power was vested in a *Superior Court,* and in such inferior courts as the *Legislative Council,* a body of thirteen appointed by the President of the United States, might establish.[26] All judges and justices of the peace were to have four year terms.

The Superior Court consisted of three judges, any one of whom could alone act as the court. In civil matters this court had original and appellate jurisdiction of cases involving $100.00 or more.[27] It had exclusive original criminal jurisdiction in capital cases and jurisdiction in all criminal cases.[28] All capital cases were to be tried before a jury of

---

[22] *Ibid.*, pp. 319-320; Charles Gayarré, *History of Louisiana* (New Orleans—1885), Vol. 4, pp. 1-31.
[23] Dart, *op. cit.*, p. 7.
[24] Thorpe, *op. cit.*, pp. 1864-1871, Secs. 1 and 12; 2 *Statutes at Large,* 277.
[25] Thorpe, *op. cit.*, p 1873.
[26] Thorpe, *op. cit.*, pp. 1864-1871, Sec. 5.
[27] It is to be noted that this jurisdiction became concurrent with that of the county courts, upon the establishments of these, in suits *ex contractu.*
[28] Likewise its criminal jurisdiction in cases not capital became concurrent with these county courts.

twelve, and a party litigant could obtain a jury, if desiring, in any civil or criminal case tried in the Superior Court.[29]

The first territorial court for "Orleans" under this act was appointed October 1, 1804. Duponceau, of Pennsylvania, Kirby, of Connecticut, and Prevost, of New York, became the first appointees for this *Superior Court.* However, as Kirby died and Duponceau declined the appointment, Prevost alone opened the court for its first session on November 9, 1804.[30]

More complete provisions for the government of the territory were made by the Legislative Council at its sessions beginning December 3, 1804, and April, 1805.[31] Twelve counties were created,[32] for each of which the Governor was to appoint an inferior judge. These county courts were to have jurisdiction in civil suits *ex contractu* above $50.00, concurrently with the Superior Court if above $100.00, and in civil suits *ex delicti* if involving less than $100.00. These were also vested with jurisdiction over criminal cases not capital, concurrently with the Superior Court.[33] All contested cases in the county courts were tried by a jury whose verdict was conclusive on questions of fact.[34] Provision was made for bills of exception to cover the facts upon which any ruling on law, complained of as erroneous, could be appealed.[35]

Each county judge was *ex officio* a justice of the peace but the Governor was empowered to appoint such an additional number of justices of the peace as he desired. These were vested with final jurisdiction over civil cases involving less than $50.00 and were also made committing magistrates.[36]

At the same session of the Legislative Council "Civil Commandants and Syndics" were abolished. The powers of the former were transferred to the judges of the county courts and those of the latter to the justices of the peace. Procedure in the Superior Court and in the county courts was regulated. Suits were to be instituted by a petition in the form of a bill in chancery. The definition of crimes and the mode of prosecution of criminal cases were to be in accordance

---

[29] Dart, *op. cit.*, p. 8.
[30] Dart, *op. cit.*, p. 9; Martin, *op. cit.*, p. 325. See also Act of Congress, March 3, 1805, Thorpe, *op. cit.*, pp. 1373-1375.
[31] *Laws of 1805*, 1st Session, Ch. 25, p. 144.
[32] These counties were: Orleans, German Coast, Acadia, LaFourche, Iberville, Point Coupee, Atacapas, Opelousas, Natchitoches, Rapides, Ouachita and Concordia.
[33] Laws of 1805, *idem.*
[34] *Idem.*
[35] *Idem.*
[36] *Idem.*

with the common law of England. The Council also appointed a committee to prepare a civil and a criminal code.[37]

Further provisions were made by the Legislative Council at its session in June, 1805. The judge of the Orleans county court was vested with probate jurisdiction for the entire territory. The Superior Court was to go on circuit, and thus began the circuit system which continued until the Constitution of 1898.[38]

An important addition to the governmental structure was made by Congress, March 3, 1805, by the creation of a lower legislative house of twenty-five members elected by the people of the territory.[39] This newly organized territorial legislature in 1807 abolished county courts and substituted parish courts in the nineteen parishes which were newly created.[40] This marked a return to the distinctive terminology of Louisiana. These courts were vested with unlimited civil and probate jurisdiction subject, however, to an appeal to the Superior Court in cases involving in excess of $100 in principal. They possessed trial jurisdiction in criminal matters only of charges of assault and battery or profane language, and otherwise had only committing powers.[41] The old county court in New Orleans was changed to the City Court of New Orleans, but with no change in jurisdiction. Parish judges outside New Orleans were made somewhat political factotums, discharging in addition to judicial duties those of clerk, sheriff, coroner and treasurer in their respective parishes.

Reference has previously been made to the committee appointed to draft a civil and criminal code. This committee had been empowered to enlist the services of two counselors and had selected Moreau Lislet and James Brown. When the legislature convened on January 8, 1808, this committee reported "A digest of the civil laws now in force in the territory of Orleans, with alterations and amendments adapted to the present form of government." The two counselors were largely responsible for this work and had availed themselves of the newly promulgated *Code Napolèon.* The *Fuero Viejo, Fuero Juzgo,* the *Partidas, Recapilationes, Leyes de las Indias, Autos Accordodos* and the *Royal Schedules* re-

[37] Martin, *op. cit.*, p. 326.
[38] For designation of circuits, Martin, *op. cit.*, p. 342.
[39] 2 *Statutes at Large,* 322; Thorpe, *op. cit.*, pp. 1373-1375.
[40] Act of March 31, 1807, digested in L. Moreau Lislet, *A General Digest of the Acts of Louisiana* (New Orleans—1828), pp. 337-338.
[41] *Idem.*

mained part of the written law of the territory save where expressly or impliedly repealed by this digest.[42]

The trial of cases before juries during this period was certainly novel. Courts had Spanish, French and English interpreters. These would translate the evidence and, when necessary, the charge of the court, but not the argument of counsel. Those of the jury who did not understand the language of counsel would withdraw, and in the jury room a verdict would by some means be finally agreed upon.[43]

It has been noted that the cession to the United States was of the territory south of the 33° of northern latitude. Formal possession, however, had not been delivered of all this territory, and hence on October 27, 1810, President Madison ordered the Governor of the Orleans Territory to take immediate possession of these remaining portions.[44] In obedience to this proclamation, Claiborne, on December 7, 1810, hoisted the United States flag at St. Francisville and shortly thereafter established in this new part of the Territory six new parishes.[45] In January, 1811, the legislature created new judicial districts for the added parishes.[46]

Congress on February 20, 1811, approved the "Enabling Act" under which the Territory was to be admitted as a State.[47] The territorial legislature, therefore, made provision for the election of a constitutional convention of forty-five members to meet in the city of New Orleans on the first Monday in November, 1811. The inhabitants in the newly created parishes were not authorized to appoint delegates to this convention as Congress had not then determined what portions of the added territory should be part of the new state.[48]

The composition of that convention and its work shall be separately treated. Suffice it to say here that the convention completed its duties January 22, 1812, and Louisiana was admitted to the Union on April 8, 1812.[49] This date marks a new epoch in the development of its judicial system and, by virtue of the changes which were made in the Constitution of 1812, we may award it special attention.

---

[42] Martin, *op. cit.*, p. 344.
[43] *Ibid.*, p. 345.
[44] Thorpe, *op. cit.*, pp. 1875-1876.
[45] Feliciana, East Baton Rouge, St. Helena, St. Tammany, Biloxi and Pascagoula.
[46] Judicial districts of Feliciana and of Catahoula.
[47] Act of Eleventh Congress, Third Session, approved February 20, 1811, in Thorpe, *op. cit.*, pp. 1876-1878.
[48] Martin, *op. cit.*, p. 350.
[49] Act of Twelfth Congress, First Session, approved April 8, 1812, in Thorpe, *op. cit.*, pp. 1878-1880.

PART II

UNDER THE CONSTITUTIONS PRIOR TO THE CIVIL WAR

The Constitution of 1812

The first of Louisiana's constitutions was in many respects unique when compared with subsequent ones. The convention which framed it was composed of only forty-five delegates, yet remained in session some two and one-half months. This constitution was the briefest the state has had, yet it remained in force longer than any other.

The Kentucky Constitution of 1799 served as a model for the convention, as will later be shown. Although Thomas Jefferson, the great "democrat," is said to have largely written that Kentucky constitution[50] the judiciary which each established would now be considered as the opposite of democratic.

The limited records of this convention of 1812 show that on Friday, November 22, 1811, "sur motion, resolu que cette convention procede de suite a nommer au scrutin un comite de sept membres charge de preparer et soumettre a cette convention un plan de constitution."[51] The report of this committee was made just one week later, but not until December 25, did Article IV of the proposed constitution, pertaining to the judiciary, come before the convention for consideration.[52] The proposed structure and powers of the judiciary under this committee report are interesting.

This committee would have had the Supreme Court composed of three judges, with two necessary for a quorum. It would have had strictly appellate jurisdiction and then only in cases involving in excess of $300.00. Sessions would be held at the seat of government. There would have been five district judges, one in each of five districts created in the proposed judiciary article. These judges would have been appointed by the Governor and would have been compelled to

---

[50] See comment in *Saint* vs. *Allen*, 169 La. Ann. (1046) 1057.

[51] *Journal De La Convention D'Orleans, De 1811-12*, Imprime par Jerome Bayon pour l' usage de la Convention de 1844 (Jackson, La., 8 Aout, 1844), p. 4.

[52] Journal, p. 7.

reside in their respective districts while serving. The report proposed to vest these judges with criminal jurisdiction over crimes and offenses committed within their districts, and with civil jurisdiction if the amount involved exceeded $100.00 in principal.[53]

The legislature would have been empowered to establish county courts with the same civil jurisdiction as vested in district courts. No provision was made as to the term of office for any judge or for their removal from office. The Governor, with consent of the Senate, would have appointed a clerk in each parish for the district courts. Sheriffs, prosecuting attorneys and an Attorney General would have been similarly appointed.[54]

The convention gave little weight to the proposed judiciary article and, on December 23, recommitted the entire judiciary proposals to a new committee of five. Magruder and Destrehan, together with Marigny, Porter and Watkins, constituted this new committee which reported its proposals on Monday, December 30.[55] Destrehan, however, submitted a minority report.

This minority report by Destrehan differed from the report of the first committee in certain respects. According to it an alternate judge for the Supreme Court would have been appointed, who would sit in the deliberations of the court but only participate in decisions when one of the regular judges was absent. Three members, instead of two, would have been necessary for a quorum. Similar district courts were provided, but their jurisdiction in civil cases would have been only over cases involving in excess of $300.00, and they would have had appellate jurisdiction from justices of the peace in cases involving more than $50.00.[56]

The provisions of this minority report as to justices of the peace were novel. In addition to providing for the constitutional recognition of this office, it would have been made an honorary one to be filled by the legislature. These would have had exclusive original jurisdiction in civil cases if not over $300.00 was in contest, and final jurisdiction if under $50.00 was involved.[57] Although under this report by Destre-

[53] *Idem.*
[54] *Idem.*
[55] *Ibid.*, p. 8.
[56] *Idem.*
[57] *Idem.*

han judges of the Supreme Court and of the district courts would have held office for good behavior, they could have been removed upon the address of three-fourths of the members of each house.[58]

The convention rejected the minority report and adopted that submitted by the majority of the committee, with only few changes. Sections 4 and 8 of the adopted Article IV were substitute sections which were adopted Monday, January 20, 1812.[59] Sections 5 and 12 of the majority report were eliminated, leaving only twelve sections in the adopted Article IV instead of fourteen as proposed by the committee.[60] The majority report was not printed, and hence it is impossible to determine the provisions of the substituted or eliminated sections. No changes appear to have been made by the revision committee which was appointed January 2, 1812.[61]

Historians have generally said that our Constitution of 1812 was largely modeled from that of Kentucky, adopted in 1799.[62] This is undoubtedly correct. A comparison of these two documents shows only slight variations. The highest state court was termed the "Supreme Court" in the Louisiana constitution,[63] while in that of Kentucky it was termed the "Court of Appeals."[64] A minimum jurisdictional amount of $300.00 was fixed for this "Supreme Court,"[65] while Kentucky's Court of Appeals had no minimum provided by the constitution.[66] Contrary to the Kentucky constitution, that of Louisiana named the minimum and maximum number of judges for the highest court, the quorum necessary, the salary, as well as the places and dates of sessions.[67]

This Louisiana constitution left inferior courts entirely to the legislature[68] while that of Kentucky stated that each county was to have a county court, and also mentioned justices of the peace, saying that "a competent number shall be appointed" in each county.[69] In Louisiana prosecuting attorneys were to be appointed by the Governor with the consent of the Senate,[70] while in Kentucky these "*county* prose-

[58] *Idem.*
[59] *Ibid.*, pp. 14 and 15.
[60] *Idem.*
[61] *Ibid.*, p. 8. Composed of Watkins, Porter, Maquille, Urquhart and Wikoff.
[62] Martin, *op. cit.*, ch. xxviii, *passim.*
[63] Art. IV, Sec. 1, in Thorpe, *op. cit.*, p. 1286.
[64] Art. IV, Sec. 1, *ibid.*, p. 1284.
[65] Sec. 2, *ibid.*, p. 1286.
[66] Sec. 2, *ibid.*, p. 1284.
[67] Sec. 3, *ibid.*, pp. 1286-1287.
[68] *Ibid.*, Sec. 4, p. 1287.
[69] Secs. 5 and 6, *ibid.*, pp. 1284-1285.
[70] Sec. 7, *ibid.*, p. 1287.

cuting attorneys" were to be appointed by the courts therein.[71]

The provisions in the Louisiana Constitution of 1812 relative to the state Treasurer and Printer are identical with those found in the Kentucky Constitution of 1799.[72] If further evidence should be needed to substantiate the statement which has been referred to, reference should be made to Section 10, Article IV, of these two documents. It has previously been mentioned that in this Louisiana constitution the highest state court is termed the "Supreme Court," while that of Kentucky is termed the "Court of Appeals." That latter constitution provided that each court should appoint its own clerk but for the Court of Appeals to pass upon the qualifications of the appointee. These clerks could be removed by two-thirds of the judges of the "*Court of Appeals.*" The Constitution of 1812 did not provide for the manner of selecting these clerks, but it was expressly provided that they were removable by a bare majority of the "Court of Appeals."[73] This latter terminology is patently an error of the committee and appears in the printed constitution.

Both constitutions contained identical provisions reciting that existing laws were to be continued in effect until repealed,[74] but the added provision of Section 11 in the Constitution of 1812 prohibiting the adoption of any system of laws or of a Code by general reference thereto does not appear in the Kentucky Constitution of 1799.

Section 12 of the Louisiana constitution, requiring the Supreme Court to refer to the particular law upon which a decision is based "when possible," does not appear at all in that constitution of Kentucky.[75] Provisions of this latter document pertaining to the selection of a surveyor, coroner and justices of the peace for the counties[76] were omitted from the 1812 Constitution.

---

[71] Art. III, Sec. 23, *ibid.*, p. 1283.
[72] *Cf.* Sec. 9, Louisiana, and Sec. 12, Kentucky, *ibid.*, pp. 1287 and 1285.
[73] *Cf.* Secs. 10, of Louisiana and of Kentucky, *ibid.*, pp. 1287 and 1285.
[74] *Cf.* Sec. 11, Louisiana, and Sec. 8, General Provisions, of Kentucky, *ibid.*, pp. 1287 and 1286.
[75] *Ibid.*, pp. 1287-1288. Chief Justice Martin's scornful reference to and disregard of this injunction, found in *Louisiana Reports*, 3 Martin, 351, bore fruit in after years beginning with the Constitution of 1864.
[76] Secs. 9 and 10, Kentucky, *loc. cit.*, p. 1285.

It is difficult to limit oneself in treating the development of the Louisiana judicial structure. Naturally there are innumerable legislative acts as well as countless decisions of the Supreme Court having a bearing upon this topic. Certain of these must be mentioned but not without calling attention to the fact that such references are not by any means inclusive.

The first important act pertaining to the judiciary under this Constitution of 1812 was that of February 10, 1813, which organized the Supreme Court and established inferior courts.[77] The Supreme Court was to be composed of three judges and to hold court in two districts of the state.[78] The number of judges was increased to five in 1839.[79] A district court for each of seven districts was to have final civil jurisdiction in cases involving not in excess of $300.00, and to have in addition general criminal trial jurisdiction.[80] An eighth district court was created in 1822.[81]

One parish judge was to be appointed for each parish.[82] These were to have certain criminal jurisdiction over slaves, and a general probate jurisdiction.[83] Outside the city of New Orleans there was to be commissioned by the Governor at least one justice of the peace "in every Captain's district," with civil jurisdiction in cases involving not in excess of $50.00, subject to an appeal to the parish courts if in excess of $20.00. These were to have such criminal jurisdiction as had been previously vested.[84] Their jurisdictional maximum was lowered in 1816, and in 1817 the legislature required that each parish be divided into sections as according to the number of justices of the peace therein, stipulating that the civil jurisdiction of these justices would be limited to their respective section.[85] Still further change was made in 1832 by authorizing the police jury of a parish to itself divide the parish into such sections as it desired.[86]

---

[77] Lislet, *op. cit.*, pp. 292-297.
[78] *Ibid.*, Secs. 1, 2 and 17.
[79] Acts of 1839, 1, 1, in Meinrod Greiner, *The Louisiana Digest* (New Orleans—1841), Vol. 1, Sec. 494, p. 82.
[80] Lislet, *op. cit.*, Secs. 4 and 15.
[81] Act of February 15, 1822, *ibid.*, pp. 815-817.
[82] *Ibid.*, Sec. 17.
[83] Act of March 31, 1807, Secs. 12, 14, and 16, *ibid.*, pp. 337-338. This was an existing act continued in effect under the provisions of Sec. 11, Art. IV, Constitution of 1812.
[84] Act of March 28, 1818, Secs. 1 and 2, Lislet, *op. cit.*, pp. 635-638. The territorial acts referred to were: January 23, 1805, May 3, 1805, July 3, 1805, Sec. 7, April 14, 1807, Sec. 1, and of April 31, 1807, Secs. 7 and 18, *ibid.*, pp. 641-643.
[85] Act of March 19, 1816, and of February 7, 1817, *ibid.*, pp. 638-641 and 641-643.
[86] Act of 1832, 150, 1, and 152, 2, Greiner, *op. cit.*, Secs. 1876-1877 of the *Digest*, p. 286.

Various acts related to the judicial organization in Orleans. A Parish Court for Orleans was created and vested with civil jurisdiction concurrent with the District Court in cases arising within the parish, and with the same criminal jurisdiction over slaves as had been vested previously in the former city courts.[87]

A separate Criminal Court for the City of New Orleans was created in 1818, to be composed of three judges appointed by the Governor with the consent of the Senate from among those licensed by the Supreme Court.[88] Its territorial jurisdiction was extended the next year to the whole of the First District.[89] Its name was changed to that of the "Criminal Court of the First District" in 1821, and its bench reduced to one judge.[90]

Provision had early been made for the appointment of one justice of the peace for each of the eight sections of the city of New Orleans.[91] These were vested with civil jurisdiction over "personal" actions involving not in excess of $100.00, subject to an appeal to the parish court if in excess of $20.00.[92] In so far as this act pertained to New Orleans it was repealed in 1825 by the creation of the City Court of New Orleans.[93]

This city court was composed of a presiding judge and four associates, all appointed by the Governor with consent of the Senate.[94] An additional associate justice was appointed in 1831,[95] and an additional presiding judge in 1841.[96] Each of the associate justices possessed the same civil jurisdiction formerly exercised by justices of the peace. An appeal would lie, however, in cases involving over $10.00, to the presiding judge and two associates.[97] It was later provided that the presiding judge would alone hear such appeals.[98] This presiding judge had original trial jurisdiction over cases involving more than $100.00 but not in excess of $300.00, subject

[87] Act of March 15, 1813, Secs. 1, 3 and 5, Lislet, *op. cit.*, p. 388.
[88] Act of March 12, 1818, Sec. 2, *ibid.*, pp. 329-333.
[89] Act of March 3, 1819, Secs. 1 and 2, *ibid.*, pp. 333-334.
[90] Act of January 1, 1821, *ibid.*, p. 335.
[91] Act of March 19, 1816, *ibid.*, pp. 638-641.
[92] *Idem.*
[93] Act of February 19, 1825, *ibid.*, pp. 344-352.
[94] *Ibid.*, Secs. 1 and 2.
[95] Acts 1831, 66, 1, Greiner, *ibid.*, Sec. 697, p. 109.
[96] Acts 1841, 11, 1-5, *ibid.*, Sec. 702, p. 110.
[97] Acts of February 19, 1825, Secs. 3, 4, and 6, Lislet, *op. cit.*, pp. 344-352.
In 1835, the maximum limit of the associate justices' original jurisdiction was raised to $150.00, and their decisions made appealable only in cases involving more than $25.00. Acts 1835, 178, 1, Greiner, *op. cit.*, Sec. 656, p. 104.
[98] Act of March 16, 1826, Sec. 1, Lislet, *op. cit.*, pp. 353-358.

to an appeal to either the District Court of the First District or to the parish court, at the option of appellant.[99]

Two special courts were created under the Constitution of 1812, but these courts have long since passed out of existence. A *Probate Court for Orleans* was created in 1836, to have a separate judge, and appointive, as were all the judges of that period.[100] A *Commercial Court of New Orleans* was created in 1839.[101] This court was composed of one judge having jurisdiction, except in certain restricted classes of cases, concurrent with the Parish Court of Orleans.[102]

These, then, were the various important acts pertaining to the judicial structure under the first Louisiana constitution. Constitutional provisions and legislative acts depend, however, upon judicial decisions for their final meaning. It is, of course, too great a task, and one beyond the scope of this study, to delve deeply into the reports of the Louisiana Supreme Court. However, some reference may be made to a few of the most significant cases.

It was early decided that the Constitution of 1812 vested no criminal appellate jurisdiction in the Supreme Court.[103] Not until *1843* was there any appellate tribunal for such criminal appeals. The creation in that year of the "Court of Errors and Appeals" to perform this function was held constitutional as being permitted under the provision empowering the legislature to create "inferior" courts.[104] In that case there was raised for the first time the question of whether the state could *itself* appeal in a criminal case, and the court decided in the affirmative. This question has never been subsequently seriously raised.

The very limited power of the Supreme Court under this constitution was shown by the decision of that court that under the judiciary article it "possessed no general superintending power over inferior courts" and could not issue a mandate to an inferior court compelling it to execute a judgment appealed from, even though the Supreme Court

[99] Act of February 19, 1825, Sec. 5, *ibid.*, pp. 344-352.
[100] Act 1836, 104, 2, Greiner, *op. cit.*, Sec. 602, p. 96.
[101] Act 1839, 42, 1, Sec. 681 of the Digest, *ibid.*, p. 100.
[102] *Idem.*
[103] *Laverty vs. Duplessis*, 3 Martin (O. S.), 42; *Ogden vs. Blackman*, 3 Martin, (O. S), 305. However in defining the limits of this "exclusion" many hair-line decisions were made, e. g., *Martin vs. Ashcraft*, 8 Martin (N. S.), 318; *Cf., State vs. Thomas*, 12 Robinson, (1845), 49, and *State vs. Williams*, 7 Robinson, (1844), 252.
[104] *State vs. Mathew J. Jones*, 8 Robinson 578.

had dismissed the appeal.[105] Later, however, the Supreme Court held that it would "exercise power incidental to its appellate jurisdiction; and in cases in which it is the duty of the inferior court to proceed and take cognizance, will issue writs of procedendo or mandamus."[106]

Other illustrations may be shown of the Supreme Court avoiding, when possible, many of the limitations placed upon it by the constitution when in the opinion of the court these hampered the administration of justice. It will be recalled that Section 12 of the judiciary article required courts of record to give written reasons for all decisions and to refer "when possible" to the particular law upon which a definitive judgment was based. These mandates were literally enforced by the court during its early history[107] but as time went on were no longer rigidly enforced. By 1841 the Supreme Court was holding that 'the court being satisfied that the plaintiff's claim is correct' was sufficient "reasons."[108]

To summarize, it has been shown that the Constitution of 1812 was greatly influenced by the Kentucky Constitution of 1799 and that the convention copied copiously from this latter document. The entire judiciary, including justices of the peace and clerks of court, were appointive and almost entirely removed from popular control. Although there was wide legislative discretion as to the creation of inferior courts, their jurisdiction and their powers, this legislative body, it must be remembered, was only indirectly subject to popular control, and then only to a limited suffrage.

Each court was practically independent of the others, and there were constant changes in the structure, composition and jurisdiction of these. The very low jurisdictional minimum soon resulted in a flood of appeals before the Supreme Court, and the dispatch of business in that court was further hampered by the small bench and by the provision of the Constitution compelling it to "go on circuit."

For a period of some thirty years there was no tribunal for criminal appeals. With the exception of appeals from justices of the peace, or from their equivalent in New Or-

[105] *Louisiana Bank vs. Hampton*, 4 Martin (O. S.), 298.
[106] *State vs. Judges of Probate for City of New Orleans*, 17 Louisiana (1841), 486; and *State vs. Judge Bermudez*, 14 Louisiana, 478.
[107] *Gray vs. Laverty*, 4 Martin (O. S.) 463; *Seghers vs. His Creditors*, 10 Martin (O. S.), 54, and *Montserrat vs. Godet*, 5 Martin (O. S.), 522.
[108] *Sarah Jacobs vs. Levy*, 12 Louisiana, 410.

leans, there were no intermediate appellate tribunals. There did exist, however, a multiplicity of tribunals with original jurisdiction and conflicts between these, as a natural consequence, arose. Multifarious functions were performed by the inferior judges, particularly by the parish judges. Many of these functions were non-judicial.[109]

Yet the formative period of the judicial history as a state was a fecund one. Faced with difficulties on every side, the Supreme Court guided the new state with a stern hand and firmly established judicial tenets. The accomplishment of this task has earned the deference which courts and counsel of today pay to decisions rendered over a hundred years ago and is a marked tribute to Martin and his associates.

The Constitution of 1845

The second of our constitutional conventions assembled at Jackson on Monday, August 15, 1844. The constitution which was framed by that convention was hailed as a "democratic" achievement. Instead of the Governor being named by the legislature from the two candidates receiving the highest popular vote this Constitution of 1845 made the popular suffrage final. Property qualifications for the electorate were abolished, and the pairing of executive powers for the benefit of the legislature or the people was begun. The extent to which the advocates of more popular control were to change the judicial structure will be later shown.

The attitude of the people at large and of the convention as a whole was, however, that a thorough reorganization of the judiciary was needed. The Act of 1841, submitting to the people the question of calling a convention, had included, among other provisions to be submitted, one which provided that "the 2d and 3d Sections of Article Fourth of the Constitution be amended so as to enable the Legislature, if they deem proper, to enlarge the jurisdiction of the Supreme Court by conferring upon it a general supervisory control over inferior courts, and making it a Court of Errors in civil and criminal cases,—" and that "the 3d Section of said Article Fourth of the Constitution be amended so as to authorize other places besides those mentioned in said section for holding the sessions of the Supreme Court."[110]

[109] *State vs. Judge*, 12 Louisiana, 409.
[110] *Official Report of the Debates in the Louisiana Convention, 1844-45*, p. 16.

Among the standing committees which the president of the convention, Mr. Joseph Walker, of Rapides, early appointed was a judiciary committee.[111] A recommended judiciary title was submitted by a majority of the committee.[112] The remaining members submitted a minority report differing in very material points.[113] The main divergence was on the broad principle of selection of judges and other judicial officers. The minority report provided for an entirely elective judicial system, while the majority report provided for the retention of an appointive one.

On other structural principles these reports also differed. That of the minority left to the legislature the establishment of inferior courts below the district courts. It proposed a Supreme Court of three, instead of four as recommended by the majority report, and for terms of six instead of ten years. It would have retained the civil appellate minimum jurisdictional amount for the Supreme Court at $300.00, while the report of the majority provided for an increase to $500.00. Both reports, however, would confer criminal appellate jurisdiction on the Supreme Court. The minority report would have limited the appellate jurisdiction of the Supreme Court to questions of law, both in criminal and civil cases, although it would have permitted the legislature to extend this appellate jurisdiction to questions of fact.[114]

The parish courts, under the existing system, were the target of all factions in the convention. The multiplicity of functions, the money patronage of the judges, and the conflicts of jurisdiction caused by the existence of such courts were almost universally condemned. True, the parish courts had their defenders, such as Mr. I. T. Preston, but in the main the attitude of the convention was that expressed by Mr. C. M. Conrad who, in speaking for the adoption of the first section of the majority report, stated.[115]

> What is the essence of this clause, what change does it propose? It proposes that the jurisdiction of

[111] *Ibid.*, p. 20. This committee was composed of J. R. Grymes, Chairman, G. Eustice, G. R. King, J. F. Brent, P. Soule, C. Roselius, L. Saunders, G. S. Guion, I. T. Preston, Z. Labauve, H. Trist and I. Garrett. *Idem.*

[112] Messrs. Grymes, Eustice, King, Roselius, Saunders, Guion, Labauve and Garrett. *Ibid.*, p. 82.

[113] *Ibid.*, p. 84. Preston joined in the minority report because he concurred in its principles, but he favored the retention of the parish courts, which both reports abolished. Trist and Soule did not concur in either report but withheld their opinions of the judiciary until consideration of it came before the convention. *Ibid.*, p. 86.

[114] *Ibid.*, p. 84.

[115] Official Debates, *op. cit.*, p. 683.

> the probate courts should be vested in the District Courts. There are many powers exercised by the Parish Judges that are not judicial. The Parish Judge is the 'Caleb Quotem.' He is judge, notary, auctioneer, police juryman, etc., etc. He is the Caleb Quotem of his parish. Is a petition to be presented for the opening of a succession, to whom is it presented? To John Stiles. Is there an order to be entered upon that petition? Who enters that order? John Stiles. Who makes out the papers as Clerk? John Stiles. Is a family meeting deemed necessary for the interest of the minor? Well, before whom is it held? John Stiles. Are the proceedings to be homologated? Who homologates them? John Stiles. Who gives the order for the sale of the property? John Stiles. Who sells it as auctioneer? John Stiles. Who makes out the bill of sale? John Stiles. He first orders and then does. He performs multiform and incongruous duties. He has not alone judicial functions and ministerial functions, but he has oracular functions. He acts occasionally as the village priest and ties the nuptial knot. But who is this eternal John Stiles? John Stiles is the PARISH JUDGE.

Condemnation of the parish court system was freely made. Mr. Brent said that the judges "were perfect factotums. Officers who might perform the ceremony of marriage for your children, protest your promissory notes, make your last will and testament, and cry your horse or sell your household furniture at public vendue."[116] The peculiarity of such a system and its historic background was also dwelt upon by Mr. Brent:

> There is nothing like the Parish Judge system to be found in any other state in the union. The only system to which it may be assimilated is that of the Spanish Alcaldes or Commandants that formerly governed in this country in the name of His most Catholic Majesty. These Commandants were the political Caleb Quotems of their day. Their will was practically the only law of the land. The usual custom of those

[116] *Ibid.*, p. 684.

> times was to apply to the Alcalde of the 'arrondissement,' who redressed the wrongs complained of, or, too frequently, inflicted greater, according to the influence of the parties who came before him. Where the matter in dispute was too great for the action of the Alcalde, the Commandant administered justice in his own way.

Perhaps the most interesting fight, however, made in the convention was on the question of an elective judiciary. The consideration of that principle was forced upon the convention by Mr. Reed who said:[117]

> I rise, Mr. President, for the purpose of putting the elective ball in motion, hoping that others will keep it rolling until all opposition shall be overcome.

The scathing denunciation of the appointive judiciary, termed by Mr. Reed as corrupt and irresponsible and even comparable to the "Augean stables," was continued by Mr. Brent who, in answer to the argument that it was necessary for the judiciary to be independent of popular clamor, said:[118]

> As for myself, I would rather the Judiciary should be the thermometer, to indicate the rise and fall of popular excitement, or that it should become a weathercock to designate which way the winds of popular feeling blow, than that it should be constituted into a court of record to register the edicts of the executive mansion or the mandates of legislative usurpation.

That the experiment had actually been successfully tried was stressed by Brent. He called the attention of the convention to the fact that Connecticut had a partially elective judicial system, and he pointed to Mississippi which in 1832 had adopted the elective judiciary system entirely.[119]

No arguments were introduced against the proposed reform and in fact it seemed that no one wished to publicly admit his distrust of the electorate. The yea and nay vote was called on Mr. Brent's substitute motion for an elective

---

[117] *Ibid.*, pp. 741-743.
[118] *Ibid.*, p. 748.
[119] *Ibid.*, pp. 754-755. Brent read a letter from a distinguished Mississippi Attorney, J. A. Quitman, written March 22, 1845, in which Mr. Quitman said that, although he had been the leader of the opposition to the elective principle in the Mississippi Constitutional Convention of 1832, he had been won to it and regarded it as "eminently successful" in his state. *Ibid.*, p. 755.

judiciary and the motion was defeated by a vote of 40 to 20.[120]

Spasmodic attempts were later made to secure a judiciary more responsive to the people. When the section of the majority report relative to the appointment of district judges came before the convention, Mr. Thos. C. Porter offered a substitute motion which provided for their election by "joint ballot of both houses of the General Assembly." He said that little John Stiles, the parish judge, could not compare to old John Stiles, the Governor; that "little John had nine functions—old John has the appointment of the Supreme Court, and I suppose all the District Courts, of fifty Sheriffs, of fifty Coroners, of three hundred notaries, of five hundred Justices of the Peace, and a thousand others too tedious to mention."[121] This substitute motion was rejected, however, as was Brent's attempt to have these district judges made elective directly.[122]

A number of those who opposed the suggestion by Porter and Brent did recognize the strong possibility of executive usurpation and the advantages which would result from continued tenure of good judges. Mr. Soule, therefore, proposed that the Governor be compelled to present *three* names to the Senate, including the incumbent, and that from these three the district judge would be selected;[123] Claiborne wished the incumbent alone to be presented to the Senate at the expiration of each term.[124] Eustice would have empowered a majority of the Senate to re-appoint an incumbent even though the Governor had not submitted his name to the Senate.[125] All these suggestions were, however, defeated.[126]

The question of what should be the appellate jurisdiction of the Supreme Court in civil cases occasioned quite a lengthy debate and showed that the delegates were divided in principle on this point also. Under the amendment offered by Mr. Lewis to Section 2 of the majority report the appellate jurisdiction of that court in civil cases, as well as in criminal cases, would have been limited to "questions of law

[120] *Ibid.*, p. 758.
[121] *Ibid.*, p. 772.
[122] *Ibid.*, p. 784. Porter's motion was defeated by a vote of 80 to 28, while that by Brent was defeated by a vote of 87 to 28. *Ibid.*, pp. 772 and 784.
[123] *Ibid.*, p. 785.
[124] *Ibid.*, pp. 787 and 792.
[125] *Ibid.*, p. 792.
[126] Eustice's motion was defeated by a vote of 86 to 21, *ibid.*, p. 794; that by Claiborne, 82 to 24, *idem;* and that by Soule was tabled, *ibid.*, p. 788.

only.'"[127] The arguments used by Lewis were along two lines: first, that the trial judge and jury were best able to determine the truth of a witness' statement and weigh the facts; and secondly, that should the Supreme Court be compelled to sift through voluminous records of testimony it would not only be unable to satisfactorily judge the facts from the printed record but it would be swamped under this task, particularly in view of the extension of its civil jurisdiction.[128]

Opposition to Lewis' amendment stressed that questions of fact were so closely interwoven with questions of law as to be most difficult of separation; that the development of the waiver of jury trials in civil cases would, under such a principle, make the trial judge the final judge; and that, on the other hand, juries were not yet sufficiently competent to be vested with such absolute power.[129]

Recognizing defeat as practically certain, Lewis sought unsuccessfully to secure the adoption of a specific provision permitting the legislature to limit the civil appellate jurisdiction of the Supreme Court to questions of law only. The opposition, however, contended that such a provision would be superfluous as "the Legislature, under the Section, possessed this power, and that the Legislature in 1813 and again in 1817 had passed such laws upon that very matter, under a similar section, although resulting in a complete failure." These opponents also said the Supreme Court had held that the legislature possessed such a power even in the absence of such specific provision.[130]

With only one change the convention adopted the recommendations of the majority report as to the appellate jurisdiction of the Supreme Court. That change was to maintain the civil appellate minimum at $300.00 instead of making the recommended increase to $500.00.[131]

The advocates for an elective judiciary were only successful in obtaining popular election of justices of the peace, clerks of court, sheriffs and coroners.[132] However, this inroad was later to prove a mighty wedge for those advocating a judiciary directly responsive to the electorate.

---

[127] *Ibid.*, p. 800.
[128] *Ibid.*, pp. 800-803.
[129] *Ibid.*, pp. 803-804. This opposition was led by Mayo, Eustice, Preston and Grymes.
[130] *Ibid.*, p. 815. *Acts of 1817*, p. 84, Sec. 12; *Livingston vs. Heerman*, 9 Martin (O. S.), 656.
[131] Official Debates, *op. cit.*, p. 815.
[132] *Ibid.*, pp. 816-828; Louisiana, Constitution of 1845, in Thorpe, *loc. cit.*, p. 1402, Articles 81-83, inclusive.

The main features in which this Constitution of 1845 differed from its predecessor have been shown. It is not the purpose of this study to minutely compare these two documents. The reader will recall that under a legislative act of 1839 the Supreme Court was composed of five judges, the Constitution of 1812 having left the number of such judges to legislative discretion with the restriction that the court should have not less than three nor more than five. The newly adopted constitution eliminated this legislative discretion and fixed the bench at four judges, including a chief justice.[133] As has also been noted the jurisdiction of the Supreme Court was broadened with respect to civil appeals, even though the monetary minimum was maintained at the same sum; and in addition criminal appellate jurisdiction was conferred.[134]

The legislative discretion which had been permitted under the first constitution as to inferior courts was greatly shackled by the Constitution of 1845. Not only were the inferior courts constitutionally recognized and created but their jurisdiction was constitutionally limited.[135] The parish courts, of statutory creation under the authorization of the 1812 Constitution, were, of course, abolished. The changes made as to selection of the judiciary have been already discussed at length.

The change made as to tenure of judges of the Supreme Court was a very important and material one. Instead of "for good behavior,"[136] the tenure of these judges was fixed at eight years.[137] The tenure of office for the district judges was fixed by the 1845 Constitution at six years.[138] Under the 1812 Constitution the tenure for inferior judges had been for terms of "good behavior" and the kind and nature of inferior courts were as might be established by the legislature.[139]

Although the Constitution of 1845 was shortlived, having been superseded by that of 1852, certain of the decisions thereunder pertaining to the judiciary are of interest. The Supreme Court early held that this constitution gave it no general superintending control over inferior courts,[140] but

[133] Constitution of 1845, Art. 64, Thorpe, *loc. cit.*, p. 1400.
[134] *Ibid.*, Art. 68, p. 1400.
[135] *Ibid.*, Art. 78 p. 1401.
[136] Constitution of 1812, Art. IV, Sec. 5, *ibid.*, p. 1387.
[137] Constitution of 1845, Art. 64, *ibid.*, p. 1400.
[138] *Ibid.*, Art. 77, p. 1401.
[139] Constitution of 1812, Art. IV, Secs. 4 and 5, *ibid.*, p. 1387.
[140] *Succession of McCarthy*, 2 La. Annual (1847) 979.

shortly thereafter it held that "the Supreme Court is bound to exercise every power incident to its appellate jurisdiction or which may be necessary to enable it to exercise that jurisdiction; and for that purpose may issue writs of mandamus to judges of the District Courts to compel them to sit in session to try pending cases so as to prevent the right of appeal being defeated."[141] The Supreme Court also assumed the power, in the exercise of its appellate jurisdiction, of making new parties in cases pending before it on appeal, when necessary in its opinion to do so.[142]

Although, it will be noticed, the Supreme Court did not hesitate to enlarge its own powers when the interest of efficiency appeared to require it, the court was not so liberal with the legislative power. It was held that, although under the 1812 Constitution the legislature could and did vest certain judicial powers in mayors, the Constitution of 1845, Article 62, did not grant the legislature authority to create inferior courts.[143]

Certain other decisions must be read in connection with the provisions of this Constitution of 1845. The appellate jurisdiction of the Supreme Court was held to be from *final* judgments and not from decisions of lower tribunals growing out of preliminary hearings.[144] The status of intervenors in cases was somewhat clarified by the decision that an intervenor might appeal to the Supreme Court even though *his* claim was below that court's monetary minimum if the claim of the plaintiff met the minimum.[145] The laws regulating judicial procedure were held to be continued in force upon the adoption of this Constitution of 1845 until repealed or amended.[146]

Judicial logic met a contingency not covered by the written provisions of the constitution. Article 68, in composing the court of four judges, provided that the concurrence of three judges was necessary for decision by the Supreme Court. This court, however, held that where one judge had recused himself the concurrence of only two of the remaining three was necessary.[147]

---

[141] *State vs. Judges of 5th Judicial District*, 5 La. Ann. 756; also *State vs. Reynolds, Judge*, 8 La. Ann. (1853), 28, and *Succession of Whipple*, 2 La. Ann. 236.
[142] *Planters Bank vs. Bass*, 2 La. Ann. 480.
[143] *Lafou vs. Dufrocq*, 9 La. Ann. 350.
[144] *Ex Parte Mitchell*, 1 La. Ann. 413.
[145] *Colt vs. O'Callaghan*, 2 La. Ann. 189.
[146] *State vs. McLane*, 4 La. Ann. 485; *Cuddy vs. Iron Works*, 4 La. Ann. 582.
[147] *Beaulieu vs. Furst*, 2 La. Ann. (1847), pp. 46 and 58.

To conclude, the judicial provisions of the Constitution of 1845 are particularly noteworthy as marking a beginning towards an elective judiciary. However only inferior courts, and not the Supreme Court, were made elective. The second most notable characteristic of these judicial provisions was that fixed terms for judges appeared instead of terms "at good behavior." The vesting of criminal appellate jurisdiction in the Supreme Court for the first time, and the decisions allowing an appeal by the state in criminal matters, are to be remembered. The Supreme Court had begun to assume some power of control over inferior courts, although it should be remembered that a broad "supervisory power" had not yet been bestowed on it. Legislative discretion in the matter of courts was greatly shackled by this constitution as apparently the electorate feared not only executive but also legislative abuse.

The Constitution of 1852

The strenuous efforts in the Convention of 1844-45 to bring the state government, in all its phases, closer to popular control has been commented upon. The partial success of this movement insofar as it pertained to the judiciary bode well for the continuation of its efforts. This movement towards democracy was not at all confined to Louisiana but was, rather, a general one of the period. Its advocates in Louisiana succeeded in having a new constitution framed only seven years after that of 1845 had been adopted, and this successor incorporated, for the first time, an entirely elective judiciary in our organic law.

The Convention of 1852 selected as its President, Mr. D. F. Kenner, and among the first committees appointed by President Kenner was a judiciary committee of ten members.[148] This committee, on July 14, 1852, submitted a *unanimous* report.[149] The report was accorded great deference by the convention as is illustrated by the fact that of the original articles appearing therein only two were

[148] *Journal of the Convention to form a New Constitution for the State of Louisiana, 1852* (New Orleans—1852), p. 15.
This committee was composed of R. Hunt, Chairman, Judah P. Benjamin, C. Dufour, E. A. Bradford, J. G. Campbell, R. W. Richardson, C. L. Swazer, U. B. Phillips, C. A. Bullard and W. S. Parham. *Idem.* By far the most distinguished member was Mr. Benjamin, later to become Attorney General, then Secretary of War and finally Secretary of State for the Confederacy.
[149] *Ibid.*, pp. 33 and 34.

amended on the floor of the convention. Both these amendments were of a minor nature.[150]

The committee later presented a sub-report containing four additional articles.[151] All except the second of these were adopted without amendment and appear as Articles 81, 83 and 84 of the adopted constitution. This second article was only amended so as to hold judicial elections separate from others,[152] and is numbered Article 82 of the constitution.

This almost perfect agreement of the majority of the convention with the recommendations of the judiciary committee is a remarkable tribute to the men composing that committee; in fact such respect has never been accorded to similar committees in any subsequent convention. There were, of course, certain proposals at variance with the committee recommendations.

An attempt was made to specifically vest judicial power in "District Courts," to be of constitutional creation as had been the case under the preceding constitution, but the amendment offered to this end was tabled.[153] The clause, which appears in Article 62 of the adopted constitution, empowering the legislature to restrict the civil appellate jurisdiction of the Supreme Court to questions of law, was objected to by Lobdell but his motion to strike out this clause also was tabled.[154] The discussion in the Convention of 1845 over the insertion of such a clause is of interest on this point, and it will be remembered that such a clause was not inserted in the Constitution of 1845.[155] A specific grant of this power to the legislature was omitted from the Constitution of 1864, as will be later noted, and has never again appeared in our organic law.

The recommendations of the committee report as to the composition of the Supreme Court, and the term and salary of the judges, were disputed in the convention. McMillen proposed that this court have a Chief Justice and *two* associates, the former to be elected for six years and the associates to be elected for four years.[156] This proposal was defeated by a vote of 74 to 30. Cotten likewise proposed a

[150] *Ibid.*, pp. 60 and 61.
[151] *Ibid.*, p. 61.
[152] *Ibid.*, p. 62.
[153] *Ibid.*, p. 52.
[154] *Ibid.*, p. 52.
[155] See *supra*, pp. 24 and 25.
[156] Official Journal, *op. cit.*, p. 55.

court of three, instead of five, but his proposal would have made these elective *at large* and for six year terms. This motion was tabled.[157] The only change Richardson wished to make to the committee recommendations was to decrease the number of associate justices to *two,* but his amendment was tabled by a vote of 68 to 42.[158] Thompson wished the terms to be six years, while Reeves proposed that these Supreme Court judges be selected for terms of eight years.[159] However, as has been previously stated, all amendments offered to this article of the report were rejected.[160]

Certain proposed amendments were offered to those articles of the committee report pertaining to the Attorney General and the district attorneys. Mr. Price favored a two year term for the district attorneys, while Cotten proposed that *both* types of officers be limited to two year terms. Neither gentleman, however, was successful in thus amending the report, and the Attorney General as well as the district attorneys were given terms of four years.[161]

An official unique in the Louisiana judiciary would have been created had the proposal offered by Mr. St. Paul been adopted, that: [162]

> The Legislature shall cause to be attached to each Court to be organized in New Orleans, a *Master in Chancery,* whose duties shall be the same as those belonging to such officers in Courts of Equity.

The jurisdiction to be vested in justices of the peace was a disputed question in the convention. Mr. Hernandez sought to increase the maximum jurisdictional limit for these officials from $100.00, as recommended by the committee, to $150.00, but he was unsuccessful;[163] Isaacks failed to restrict their criminal jurisdiction to "minor crimes and offenses."[164] A novel extension of the criminal jurisdiction of these justices was proposed by Parham who would have granted them trial jurisdiction over petty offenses with the sentence to be imposed not exceeding ten days in jail or a fine of $50.00. This proposal was tabled by the convention.[165]

---

[157] *Ibid.*, p. 55.
[158] *Idem.*
[159] *Ibid.*, pp. 56 and 58.
[160] *Ibid.*, pp. 55-58 inclusive.
[161] *Ibid.*, p. 59.
[162] *Idem.*
[163] *Ibid.*, p. 60.
[164] *Idem.*
[165] *Ibid.*, pp. 44 and 60.

The power of the executive to fill vacancies among clerks of court, permitted under the committee report, was disapproved by Mr. Carter who sought to limit at least this power of executive appointment to those vacancies having less than a year unexpired.[166] However the convention rejected an amendment offered by Carter to this effect.

It will be noted that the committee report provided that the state should be divided into four Supreme Court districts, although this committee did not attempt to district the state. For that purpose, a special committee was appointed which reported, July 27, through its chairman, Andrew S. Herron. A strong dissent was made by a minority of the special committee.[167] The convention agreed with the dissenters that the districting under the report was grossly unfair and adopted a substitute plan which composed the districts as found in the adopted constitution. The substance of the change was to make it possible for Orleans to predominate both in the First and Second Districts instead of merely in the First.[168]

Only a broad comparison of the Constitution of 1852 with its predecessor of 1845 shall be attempted. The striking difference, of course, is the elective feature of the 1852 Constitution, as has been noted. Other marked differences, however, appear. Article 61 of the Constitution of 1852 created a Supreme Court and recognized justices of the peace, but left inferior courts to the discretion of the legislature within limitations.[169] It will be remembered that Article 62 of the 1845 Constitution had specifically created district courts also, and that no power was given the legislature under that constitution to establish inferior courts.

The wording of both constitutions was similar in defining the jurisdiction of the Supreme Court, except that the Constitution of 1845 expressly provided for contests over the legality or constitutionality of "taxes, tolls and imposts" to come under the jurisdiction of the Supreme Court *irrespective* of the monetary amount involved.[170] The omission of such a provision by the Convention of 1852 was not corrected until the Constitution of 1868.[171] That constitution, and sub-

[166] *Ibid.*, p. 60.
[167] Official Journal, *op. cit.*, pp. 68, 69 and 71.
[168] *Ibid.*, pp. 68, 69, 71, 76 and 77.
[169] *Mayor vs. Deering*, 15 La. Ann. 208.
[170] *Louisiana Constitution of 1845*, Art. 63, Thorpe, *loc. cit.*, p. 1400. *Albert vs. Brewer*, 9 La. Ann. 64.
[171] *Louisiana Constitution of 1868*, Art. 74, *ibid.*, p. 1458.

sequent ones, not only supplied the omission but, by transposition of the words "regardless of amount involved," made it clear that appeals from contestations over the legality of a "fine, forfeiture or penalty imposed by a municipal corporation" would also lie to the Supreme Court irrespective of the amount.[172]

The Constitution of 1852, besides making the Supreme Court elective from districts, increased the bench from four to five and the term from eight to ten years.[173] Notwithstanding the increase in the number of judges both constitutions required the concurrence of three for decisions.[174] The term for the Attorney General and for the district attorneys was increased from two years to four years.[175]

Legislative acts were necessary to complete the judiciary which had been established. Acting under the authority of Article 68 of the Constitution of 1852 the legislature provided that sessions of the Supreme Court would be held at Alexandria and Monroe, in addition to New Orleans.[176] Under the authority of Article 61, district courts were created.[177] The state was divided into eighteen districts and for all except the first, comprising only Orleans parish, one judge was to be elected on a four year term.[178] This act also prescribed the jurisdiction for these courts.[179]

Separate provisions were made for district courts in Orleans.[180] There were to be six such courts, each with one judge elected for four years; these courts were to be governed by rules established by a majority of the judges.[181] The First District Court of Orleans was vested with exclusive criminal jurisdiction except over such minor offenses as might be conferred on recorders.[182] All successions were to be opened and administered in the Second District Court, and all matters of tutorship or curatorship came under the jurisdiction of that court.[183] The Third District Court was vested with exclusive jurisdiction over appeals from justices of the

[172] *Idem; Carondelet Navigation Co. vs. Lugger 1st.*, 37 La. Ann. 100.
[173] *Cf.* Articles 64, Constitution of 1845, and 63, Constitution of 1852, Thorpe, *loc. cit.*, pp. 1400 and 1418.
[174] *Idem.*
[175] *Cf.* Article 74 of each, *ibid.*, pp. 1401 and 1420.
[176] *Acts 1855*, p. 313, in *Revised Statutes of Louisiana*, compiled by U. B. Phillips (New Orleans—1856), pp. 278-280.
[177] *Acts 1855*, p. 41, *ibid.*, pp. 280-281.
[178] *Idem.*
[179] *Idem.*
[180] *Acts 1855*, p. 315, *ibid.*, pp. 286-288.
[181] *Idem.*
[182] *Idem.*
[183] *Idem.*

peace for the city or parish.[184] All except the First had concurrent jurisdiction over all civil cases not otherwise vested.[185]

The legislature, under the authority of Article 78, provided that as many justices of the peace would be elected from each ward of the parishes as there were police jurymen from that ward.[186] These justices were given two year terms and were vested with limited jurisdiction over cases involving not in excess of $100.00, subject to an appeal *de novo* to the district court if involving over $10.00; these justices were also permitted to exercise jurisdiction over infractions of levee laws, and over municipal or parochial ordinances where the penalty to be imposed did not exceed $100.00.[187] Their jurisdiction was territorially limited to their respective district.[188]

In the parish of Orleans it was provided that there should be seven justices of the peace elected from districts.[189] A majority of these justices were to enact rules governing their courts.[190] Contrary to the provisions governing the justices of the peace for the country parishes, the decisions of these justices were final if not in excess of $25.00 was involved.[191] The justices for all the districts except the Sixth received a salary of $2000.00 in addition to certain fees; the justice for the Sixth received only fees.[192] In addition to these justices of the peace, there were, of course, recorder courts in New Orleans.[193]

Certain decisions of the Supreme Court under this constitution should be referred to. In *State vs. Charles* this court said that it is the gravity of the punishment which *may* be inflicted for the offense charged, and not the nature of the punishment inflicted *under* the charge, which determines the criminal appellate jurisdiction of the Supreme Court.[194] Hence the state can appeal where the indictment was quashed or held bad on demurrer before trial if it

---

184 *Idem.*
185 *Idem.*
186 *Acts of 1855*, p. 479, *ibid.*, pp. 300-302.
187 *Idem.*
188 *Idem.*
189 *Acts of 1855*, p. 497, *ibid.*, pp. 302-307.
190 *Idem.*
191 *Idem.*
192 *Idem.*
193 *Acts 1855*, p. 49, *ibid.*, p. 359.
194 *State vs. Charles*, 14 La. Annual, 649.
Article 74 of the 1868 Constitution provided the contrary test, but Article 81 of the Constitution of 1879 returned to this test. *State vs. Judge*, 33 La. Annual, 1227.

charged an offense punishable at death or hard labor.[195] The state may, therefore, also appeal from a decision sustaining a motion in arrest of judgment.[196]

The power of the Supreme Court to issue writs of habeas corpus was held to be limited to cases over which it may have appellate jurisdiction.[197] However, it was said by the court to be not essential that an actual appeal be pending.[198]

It will be remembered that Article 75 of the constitution prohibited the legislature from diminishing the salary of a judge during tenure. The Supreme Court interpreted this as meaning that neither could such salaries be *taxed.*[199] Although this case was specifically reaffirmed in two later decisions, in 1874 the court evaded the principle of protection from legislative abuse.[200]

A distinction was drawn by the court between justices of the peace and "judges," within the meaning of Article 82. The court held that this article requiring "judges" to be elected at a time different from that fixed for other elections did not apply to justices of the peace.[201]

As a summary it may be said that the Constitution of 1852 created a judiciary more responsive to the electorate than ever before, although leaving much to legislative discretion. This constitution was the first establishing an entirely elective judiciary, and under it was held the first election to the Supreme Court in Louisiana. The bench of the Supreme Court was increased as were the terms of the judges. This Constitution of 1852, contrary to its immediate predecessor, left the creation of inferior courts, within certain limitations, to the legislature. On this point the Constitution of 1852 may be compared to that brief Constitution of 1812. In the exercise of the discretion permitted it, separate provisions were made by the legislature for courts in Orleans. This was, of course, but a continuation of prior precedent, although the acts created somewhat different structures than before.

---

[195] *State vs. Ross*, 14 La. Annual, 864.
[196] *State vs. Cason*, 20 La. Annual, 48.
[197] *In Re Jules Manouvrier*, 16 La. Annual, 257.
[198] *State vs. Rose*, 29 La. Annual, 755.
[199] *City of New Orleans vs. Lea*, 14 La. Annual, 197.
[200] *State ex rel vs. Towne*, 21 La. Annual, 490, and *State ex rel vs. Dranguet*, 28 La. Annual, 784.
[201] *State ex rel vs. Clinton*, 26 La. Annual, 406. *Post*, p. 54. *Andrew vs. Saucier*, 18 La. Annual, 301.

PART III

THE JUDICIARY DURING THE CIVIL WAR AND RECONSTRUCTION

The Constitution of 1864

It is beyond the scope of this study more than to briefly mention the distressed history of Louisiana during the Civil War. And the Confederate Constitution of 1861 shall not be discussed. Louisiana seceded from the union on January 26, 1861, and cast her lot with the Confederacy. For nearly a year there was very little military operation in the state. The combined efforts of Admiral D. G. Farragut and General Ben F. Butler, however, resulted in the capture of New Orleans in April, 1862.

During the first four months of this military occupancy none of the established courts had been opened in New Orleans. General Butler had, however, created a *Provost Court,* presided over by Major Joseph M. Bell of the General's staff.[202] In addition to the trial of all criminals, this court was vested with civil jurisdiction extending to all controversies, including the settlement of estates and the granting of divorces. The legality of such a court was upheld in 1873 by the Louisiana Supreme Court,[203] in which case the court stated:

> When the United States captured the city of New Orleans in 1862, the civil government under the Confederacy ceased to have authority. As an incident of war powers, the President had the right to establish civil government, to create courts—and the creation of this Provost Court was an exercise of the war powers of the United States, presumably with the consent and authorization of the President, the Commander in Chief; and of the propriety of the exercise of these powers we are not the judges. The decision of all

[202] Henry Plauche Dart, *The History of Louisiana Supreme Court,* reprinted in Louisiana Reports, Vol. 138 (1918), p. xlviii.
In his *War Politics and Reconstruction* (New York—1930), p. 269, Henry Clay Warmoth claimed to have been appointed judge of this court by General Banks, successor to General Butler.

[203] *Mechanics Bank vs. Union Bank,* 25 La. Annual, 387; affirmed by U. S. Supreme Court, 22 L. Ed., 871, 89 U. S., 297.

such questions rest wholly with those to whom the war powers were confided by the Constitution.

In the summer of 1862, General G. F. Shepley was appointed Military Governor, and one of his first acts was to issue an order in August, 1862, for the re-opening of the Second, Fourth and Sixth District Courts of Orleans. Some of the district courts for the parishes outside of Orleans had spasmodically remained open under the Confederacy, but those of Orleans had, of course, closed their doors when the city was occupied. Upon re-opening these courts in Orleans, Shepley appointed two new judges, John S. Whitaker to the Second District Court and Heinstand to the Fourth District Court. Rufus K. Howell was retained as judge for the Sixth District Court.

A *Provisional Court of Louisiana* was established by President Lincoln on October 20, 1862, and Charles A. Peabody, of New York, was appointed its judge. This court was granted all the power which had previously been vested in any federal or state court for Louisiana, and was to render its decisions as a court of last resort. Supported by Federal arms, this court remained in existence until the judiciary under the Constitution of 1864 was organized.[204]

In order that appeals from the three re-established district courts of Orleans could be heard General Shepley appointed three new judges for the defunct Supreme Court of Louisiana.[205] This Supreme Court, however, apparently never acted. The Supreme Court before the military occupancy of Orleans had consisted of Messrs. Merrick, Land, Buchanan, Duffel and Voories. The former two were apparently sitting as a Confederate Louisiana Supreme Court in Shreveport, pursuant to Act 23 of 1863, Confederate Legislature of Louisiana, while the latter three were under Federal control in New Orleans.[206] After "reconstruction," the decrees of the "rebel" courts within the Confederate lines were held binding and valid if in ordinary litigation.[207]

---

[204] Its existence and authority was maintained by the United States Supreme Court in *The Grapeshot*, 76 U. S. 133, 19 L. Ed. 651. This court was formally abolished by Congress in 1866. *Public Laws of the United States of America*, of the 1st Session of the 39th Congress, 1865, 1866, edited by George P. Sanger (Boston—1866), ch. 310, p. 344, approved July 28, 1866.

[205] Messrs. Charles A. Peabody, Chief Justice, John S. Whitaker and J. L. Cole.

[206] Acknowledgment is made for the data obtained from Dart, *History of Louisiana Supreme Court*, *loc. cit.*, pp. xlviii-xlix.

[207] *Lay vs. Succ. of O'Neil*, 29 La. Ann. (1877) 722; *Sharkey vs. Bankston*, 30 La. Ann. (1878) 891. Dart *ibid.*, p. lvi, gives 29 La. Ann. 590 as the citation, but this is apparently in error.

With the organization of the judiciary under the Constitution of 1864 these military courts were discarded. By a proclamation of March 11, 1864, General Banks ordered an "election" to be held on March 28 to select delegates for a constitutional convention; the convention itself met in New Orleans on Wednesday, April 6, 1864.[208]

The convening of that convention was tersely described by its stenographer:[209]

> This day being fixed by the General Order of Major General Nathaniel P. Banks, commanding the United States forces in the Department of the Gulf, by virtue of the authority vested in him by the President of the United States, and also agreeable with the proclamation of his excellency, Michael Hahn, Governor of the State of Louisiana. . . . The Hall was filled with delegates, and the lobbies and galleries overflowing with spectators.

The convention sat for seventy-eight days. Of the forty-eight parishes only the nineteen which were inside the Federal lines were represented.[210] Seventy-six was adopted as a quorum, although the largest number of delegates ever on the rolls was ninety-eight, of which sixty-three were from New Orleans. All, of course, were secessionists but a few wished to secure compensation for emancipated slaves.[211]

Although the convention concerned itself chiefly with repudiating the debts of the Confederacy and with abolishing slavery, the re-organization of the judiciary was also attempted. A judiciary committee of seven was appointed by President E. H. Durrell on Friday, April 13, 1864.[212] This committee made a unanimous report on April 22.[213] Under this report the members of the Supreme Court and all inferior judges, justices of the peace, the Attorney General, district attorneys, coroners and sheriffs were to be *appointive.*

---

[208] John Rose Ficklin, *History of Reconstruction in Louisiana, through 1868* (Baltimore—1910), pp. 55, 56 and 57.

[209] *Official Debates of the Constitutional Convention, 1864,* p. 8.

[210] Ficklin, *op. cit.,* pp. 68-69.

[211] *Idem.*

"The Convention was composed of political waifs and estrays from nineteen parishes, but of course some men of character and ability were found in the gathering. The debates of this Convention were preserved and printed, and they constitute a political *opera boufe* or side show to the awful tragedy of life in Louisiana in 1864." Henry Plauche Dart, *History of Louisiana Supreme Court, loc. cit.,* p. L.

[212] *Debates, op. cit.,* p. 43.

This committee was composed of R. K. Howell, Chairman, H. J. Heard, R. King Cutler, John Henderson, Jr., R. Beauvais, Wm. H. Seymour and James Fuller. *Idem.*

[213] *Ibid.,* pp. 73 and 74.

All judges and justices of the peace would have been appointed "for good behavior," while the other named officials would have served for the term of the Governor appointing them. In its remaining features this report followed closely the judicial provisions of the Constitution of 1852.

The chief dispute in the convention over the report of the judiciary committee was whether the judiciary should be elective or appointive. Closely interwoven, of course, were differences of opinion as to length of terms and compensation. Anything but an orderly and courteous procedure was followed in the debates. Added to the bitterness among the members, the mob spirit of the times and the clutches of war, there was the great additional handicap of the disfranchisement of so much talent.

Preliminary to the heated fight over the method of selection, various amendments were offered to the committee report. Henderson, although he had joined in the report, wished to confer criminal appellate jurisdiction upon the Supreme Court both as to law and fact, and to extend its criminal appellate jurisdiction to all criminal cases.[214] He later withdrew this amendment and instead proposed that the Supreme Court have such jurisdiction "upon law and fact in civil and criminal cases" as might be prescribed by the legislature and also have a supervisory control over inferior courts.[215] Another proposal, by Abell, was that the Supreme Court have a "general superintending control over all inferior and other courts of law; shall have power to issue writs of error and supercedas, certiorari, habeas corpus and quo warranto and other remedial writs, and to hear and determine the same."[216] This proposal, so its introducer said, was borrowed from the United States constitution. The convention, however, defeated this proposal as well as the substitute by Henderson, although each received an appreciable vote.[217] Not until the Constitution of 1879 was a general superintending power to be vested in the Supreme Court.[218]

It should be remembered that the differences of opinion among the delegates on basic questions of judicial structure were largely the result of the peculiar conditions existing at

[214] *Ibid.*, pp. 109 and 278.
[215] *Ibid.*, 280.
[216] *Ibid.*, pp. 268 and 278.
[217] *Ibid.*, pp. 279 and 281.
[218] *Constitution of 1879*, Article 90, in Thorpe, *op. cit.*, p. 1485.

the period rather than the result of broad differences in principles. A study of the proceedings of this convention justifies the conclusion that such practical considerations as fear of such trial judges as might be opposed to a "carpet-bag regime" led many to advocate an appointive system with a strong control and right of review over the inferior courts.

The first onslaught on the appointive feature of the committee report was led by Terry. Personalities rather than principles were made the issues and, considering the composition of the convention and the spirit of the period, this manner of argument appears to have been wise. Terry called upon the "shades of Washington, Jefferson and Franklin;" he termed the appointive Federal judges "antiquated old fogies." Sullivan said that "framers of the report wished to make an Emperor or a Czar of the Governor."[219] Stauffer protested that "it is easier to bribe one man than an entire community."[220] Orr said he was "opposed to an aristocratic Judiciary."[221]

In addition to the arguments used in prior conventions in urging an appointive judiciary the proponents of such a system introduced in this convention such novel political arguments as have already been briefly touched upon. Prejudices were adroitly appealed to. Cutler referred to the Constitution of the United States and said:[222]

> Look at the organic law which gave your liberty birth. There is the foundation to build upon, and a sufficient reason for an appointed Judiciary in a state.

In speaking of the introduction of the elective judiciary into the organic law of the state Cutler told the convention that "Slidell, Benjamin and others," whom he termed "workers in the crime and slime of treason," were the authors of the elective feature in the Louisiana Constitution.[223]

As a crowning agrument Cutler cleverly suggested to "freedmen" a fear of the ballot by saying:[224]

> If you vote for an elective judiciary, do you not inculcate an unholy principle in giving a chance to disloyal men to place upon the bench a disloyal traitor?

[219] *Debates, op. cit.*, p. 284.
[220] *Ibid.*, p. 311.
[221] *Ibid.*, p. 333.
[222] *Ibid.*, pp. 290 and 291.
[223] *Ibid.*, p. 291.
[224] *Ibid.*, p. 294.

Others mentioned what they considered the evils of the elective judiciary in its broad aspects. According to Thorpe "an elective judiciary naturally fell into the hands of political gamblers or speculators." An old argument was bluntly paraphrased by Wilson as follows:[225]

> Do you want men to sit on the judicial bench who go into beer saloons, five-cent coffee houses and groggeries and electioneer for the purpose of becoming judges?

Abell quoted Ulysses to the effect that "the worst of tyrants is an usurping crowd." He pointed with admiration to the judiciary of England and its development through a system with appointments at the will of the King, producing "craven wretches" such as "Trevelyan, Saunders, Jeffries and Wright," to its present system of tenure by appointment for duration of good behavior.[226] England's "House of Lords and Court of King's Bench are proud monuments to show what a Judiciary ought to be" in the opinion of Henderson.[227]

Howell, himself a judge,[228] discussed judicial statistics in showing how each system had worked in Louisiana. He pointed to the very small vote at judicial elections held under the Constitution of 1852 and drew the conclusion that "the whole voting statistics show a beggarly want of numbers in every judicial election since 1853, and is a tremendous commentary upon the elective system, and the result is necessarily this: that the election of judges falls into the hands of political characters and professional voters."[229]

Thus were the battle lines in the convention drawn. Compromise proposals were introduced after advocates for each system had exhausted their arguments. Those favoring the election of judges, in an attempt to overcome the fear that an elective judiciary might punish "loyal men," offered to have an appointive judiciary until two years after "peace" and to have the elective system then commence operation.[230] As long tenures and high salaries were the primary features desired by Abell, he proposed a compromise whereby inferior

[225] *Ibid.*, p. 292.
[226] *Ibid.*, p. 302.
[227] *Ibid.*, p. 304.
[228] *Supra.*, p. 36.
[229] *Ibid.*, p. 321.
[230] *Ibid.*, p. 318.

judges would be elective but the judges of the Supreme Court appointive for good behavior and with large salaries.[231] Election of Supreme Court judges by joint vote of the legislature, with inferior judges and their clerks popularly elective, was proposed by Stauffer.[232] Under this the term of office for the Supreme Court judges would have been ten years while that of inferior judges would have been six years.[233]

Numerous test votes showed clearly, however, that the advocates of the appointive system were in a majority. The great confusion in the convention, the pitiful attempts at orderly procedure and the bewilderment of the delegates were all utilized by the advocates of an elective judiciary in a carefully planned maneuver to recommit the entire judiciary title to a friendly committee. President Durell, either wilfully misstating the sense of the convention or in error concerning it, appointed such a special committee for this purpose, saying, "as there has been a majority in favor of an elective Judiciary, I shall appoint five on that side of the question and four on the other."[234]

The report of this special committee mainly differed from the original committee report, as variously amended, in that the proposal made by Abell to vest the Supreme Court with wide supervisory power over inferior courts was incorporated therein, and an entirely elective judiciary was provided for. The first terms of the judicial offices would have been filled by appointment, however.[235] Justices of the peace would have received fixed salaries instead of fees.[236]

A substitute for this entire report of the special committee was offered by Stockler, eliminating the "supervisory" provision and leaving to the legislature the terms of office and salaries.[237] Under this substitute, judges whom the legislature thought recalcitrant could have been legislated out of office or their salaries could have been either increased or decreased entirely at the will of the lawmakers.

---

[231] *Ibid.*, pp. 285-287.
[232] *Ibid.*, p. 811.
[233] *Idem.*
[234] *Ibid.*, p. 368.
[235] *Ibid.*, pp. 369-370, Arts. 14 through 18 of the report. This report was signed by J. H. Wilson, Chairman, Charles Smith, John Purcell, O. H. Poynot, M. W. Murphy and John Buckley, Jr.
[236] *Ibid.*, p. 369, Art. 14.
[237] *Ibid.*, pp. 372-373. The report of the special committee prescribed the following terms: six, four and two years for Supreme Court judges, inferior judges and clerks, respectively; two years for district attorneys, coroners and sheriffs; four years for the Attorney General.

However, as has been stated, the sense of the convention was strongly for an appointive judiciary. Stockler's substitute was rejected and the recommendations of the special committee were likewise disregarded.

A comparison of the adopted judiciary title with the contested recommendations made by the committees and by delegates on the floor of the convention will show changes worth noting. Article 77, as adopted,[238] provided for the removal of all judges upon the joint address of a majority of the members *elected* to both houses of the legislature instead of three-fourths of *those present* as provided in Article 9 of the judiciary committee report. The adopted provision was in line with amendments which had been offered by Campbell and Stockler[239] and which had been incorporated both in the report of the special committee and in the substitute by Stockler.

Article 79 of the adopted constitution provided for the appointment of the Supreme Court judges for eight years.[240] Article 11 of the judiciary committee report had fixed this appointive term at good behavior; the report of the special committee had provided for the election of these judges (after the first term) for six years, and Stockler's substitute had called for their immediate election for such terms as fixed by the legislature.

Clerks of court were made elective for terms of four years in accordance with an early amendment by Stauffer.[241] This was contrary to Article 12 of the judiciary committee report which had provided for their immediate appointment during good behavior, and was likewise at variance with the provisions of the special committee report which would have made these officials elective only after the first term. It is to be remembered that Stockler's substitute, although providing for this office to be an elective one, had left the term to be fixed by the legislature.

Justices of the peace under the Constitution of 1864 were elective for two year terms, with such criminal jurisdiction as the legislature might confer, and with civil jurisdiction over cases involving not in excess of $100.00 in principal.[242]

---

[238] Constitution of 1864, Thorpe, *loc. cit.*, p. 1439.
[239] *Debates, op. cit.*, p. 835.
[240] Constitution, *loc. cit.*, p. 1439.
[241] *Debates, op. cit.*, pp. 864 and 865.
[242] *Constitution, loc. cit.*, Art. 82, p. 1440.

Article 14 of the judiciary committee report was identical on these points, save that it provided for these justices of the peace to be appointed for good behavior. Stockler's substitute differed only from the adopted article in that the term was not fixed. The report of the special committee, although apparently making them elective (after the first term), did not mention their criminal jurisdiction and would have provided fixed salaries instead of fees for these justices of the peace.

The Attorney General and district attorneys were elected for four year terms, while sheriffs and coroners were elected for terms of two years, under the adopted constitution.[243] These provisions differed from Articles 15 and 16 of the judiciary committee report in that the latter made these officials appointive for the term of the Governor appointing them. The report of the special committee differed only from the adopted articles in that the first terms were made appointive. The substitute by Stockler differed only in that it left the terms of office to legislative discretion.

When compared with the Constitution of 1852 the judiciary provisions of the adopted constitution chiefly differed in making the judges of the Supreme Court and inferior courts appointive. As has been mentioned in an earlier chapter there was omitted any provision empowering the legislature to restrict the jurisdiction of the Supreme Court to questions of law only.[244] Salaries of the Supreme Court judges were increased,[245] although their term of office was decreased.[246] Instead of being compelled to refer to the particular law justifying every definitive judgment "whenever possible," the Supreme Court was only required to do so "whenever advisable."[247]

An important change was made as to the removal of judges. Under the Constitution of 1852 judges could be removed by the address of the legislature but only by the concurrence of three-fourths of the members *elected* to each house.[248] Article 77 of the Constitution of 1864 required only the address of a majority of those elected to each house.[249]

---

[243] *Ibid.*, Arts. 83 and 84, p. 1440.
[244] *Cf.* Arts. 62 and 70, Constitutions of 1852 and 1864 respectively, Thorpe, *loc. cit.*, pp. 1418, 1438 and 1439.
[245] *Cf.* Arts. 63 and 71, *ibid.*, pp. 1418 and 1439.
[246] *Cf.* Arts. 63 and 79, *ibid.*, pp. 1418 and 1439. The decrease was from ten years to eight years.
[247] *Cf.* Arts. 72 and 76, *ibid.*, pp. 1420 and 1439.
[248] Art. 78, *ibid.*, p. 1420.
[249] *Ibid.*, p. 1439.

These, then, were the changes made in the Louisiana judiciary system by the Constitution of 1864 and, as has been noted, the chief change was in providing for an appointive judiciary. It is of little value to this study to consider the decisions of the Supreme Court under this Constitution of 1864 or the acts of the legislature in the exercise of their discretion pertaining to the judiciary. Another constitution was drafted only four years later, and the interim produced no landmark in the judicial history of Louisiana unless travesties of justice can be so considered. Two comments should be made, however, before concluding with this Convention of 1864. The final vote in the convention for ratification was sixty-six to sixteen in favor thereof, ten less than the quorum which had been fixed.[250] Adjournment in August, 1864, was at the call of the President, Judge E. H. Durrell, who was hence empowered to reconvoke it.[251] The part which this latter incident was to play in the reconstruction history of Louisiana will be later noted.

The Constitution of 1868

Only briefly can the confused history of reconstruction in Louisiana be touched upon in this study. However, events of great importance to the political and judicial functions occurred subsequent to the adoption of the Constitution of 1864. The Military Governor, Shepley, had been succeeded early in 1864 by Michael Hahn at an election called by General Banks and held under protection of Federal troops. J. Madison Wells was elected his Lieutenant-Governor.[252] Hahn was chosen United States Senator on March 4, 1865, and Wells succeeded to the governorship.[253]

At the election which was held November 6, 1865, the negroes were not qualified to vote. Suffrage was restricted to male whites who had taken the "iron clad oath" of December 8, 1863, or the "amnesty oath" of May 29, 1865, and who had been residents of Louisiana for the past year.[254] There were two parties entering the campaign. The *National Democrats* declared strongly against negro suffrage and in general favored President Johnson's plan of reconstruction.

250 Ficklin, *op. cit.*, p. 86.
251 *Ibid.*, p. 80.
252 Ficklin, *op. cit.*, pp. 55 to 64.
253 *Ibid.*, p. 90.
254 *Ibid.*, p. 106.

In addition this party wished compensation to be paid owners for the freed slaves and desired a return to the Constitution of 1852. The old Bank's faction, now called the *Conservative Union Party,* although it did not expressly favor negro suffrage in its platform, did disagree on all other points. Both parties nominated Wells for Governor but differed on all other candidates. The *National Democratic* ticket was elected.[255]

Meanwhile the radical republicans, led by Dostie, Durrell and Warmoth, were advocating negro suffrage. They refused to recognize the existing civil government. When President Johnson became unable to handle the "radicals" in Congress, Wells deserted his party and joined the ranks of the radical republicans in Louisiana. These radical republicans began a movement to reconvoke the Convention of 1864 under the authorization which has already been commented upon. Durrell, however, refused to further this movement and, as a consequence, the preliminary meeting held June 26, 1866, elected Howell as President. Although this meeting had an attendance of only forty of the old delegates, Howell issued a proclamation to reconvene the convention for July 30, 1866. When this "Convention" opened it resulted in the so called Riot of 1866.[256]

With the impeachment of Johnson and the famous Reconstruction Acts of 1867-1868, affairs in Louisiana took an even more serious turn. Under orders from Congress, General Sheridan removed many of the civil officials and held a new registration.[257] Under this General's proclamation an election was held September 27 and 28, 1867, to decide whether a constitutional convention should be held and, if so, to elect delegates.[258] The statistics of that registration and of the election graphically picture the regime in power. Of the 127,639 registered, 82,907 were black.[259] By previous agreement the division of the ninety-six delegates elected was by allotting equal numbers to the whites and blacks. All but two were Republicans.[260]

The character of the convention's personnel must be borne in mind when considering its work. The purpose of this

[255] *Ibid.*, pp. 106 to 111.
[256] *Ibid.*, pp. 155 to 179.
[257] *Ibid.*, pp. 187 to 190.
[258] *Ibid.*, p. 198.
[259] *Idem.*
[260] *Idem;* Dart, *History of Louisiana Supreme Court, loc. cit.*, p. lii.

study will not, however, permit discussion of the political beliefs of the delegates or their attempts to elevate the newly freed and enfranchised "electorate" to a position of honor and trust for which they had neither the talent nor the training.

The convention assembled Friday, November 23, 1867, and chose as its President, James G. Taliaferro.[261] A standing judiciary committee of seven members was appointed and made its report December 20.[262] A committee on style and arrangement was also appointed.[263] Its chairman, G. M. Wickliffe, attempted to usurp the power of the entire committee, taking it upon himself to submit his personal views as being the views of the committee. So brazen was this attempt and so great the indignation aroused that the President dissolved the committee and appointed another, to be hereinafter termed the "revision committee."[264] Another of the committees to be considered, and the one which actually formulated a proposed judiciary title, was the standing committee appointed to draft a constitution.[265]

Prior to reports from this latter committee several resolutions pertaining to the judiciary had been introduced on the floor of the convention. Certain of these deserve comment at least for their uniqueness. Ingraham, of Caddo parish, proposed that persons living together as man and wife for three consecutive years, and who were debarred by slavery from legal marriage at the time, should be deemed lawful man and wife and their children recognized as legitimate.[266] Somewhat similar was the resolution by Tenchant, of Orleans parish, which provided that the constitution should guarantee legal protection to women in their civil rights, irrespective of race, color or previous condition of servitude.[267]

---

[261] *Official Journal of the Proceedings of the Convention for Framing a Constitution for the State of Louisiana* (New Orleans—1867-1868), p. 5.
Taliaferro had served in the Convention of 1852. He was an associate justice of the Supreme Court from July 1, 1866, to November 8, 1876.

[262] *Ibid.*, p. 56. This committee was composed of J. P. Ludeling, Chairman, R. Waples, A. N. Gould, Wm. R. Meadows, Thos. P. Harrison, Geo. W. Dearing, Jr. and W. H. Cooley, *ibid.*, p. 13.

[263] Besides Wickliffe, this committee was composed of R. Waples, P. G. Deslonde, W. L. McMillen, S. Belder and L. S. Rodriguez.

[264] *Ibid.*, pp. 227-232. Cooley, Waples, Crawford, McMillen, Crain and Pinchback composed this committee.

[265] *Ibid.*, p. 13. Cooley, Waples, T. S. Crawford, Ludeling, McMillen, James H. Ingram, J. H. A. Roberts, P. F. Valfroit and Chas. Leroy composed it.

[266] *Ibid.*, p. 16.

[267] *Ibid.*, p. 85.

Of more significance to this study was the resolution by Blandin, of Orleans parish, under which Supreme Court judges would have been selected by joint vote of the legislature for six year terms, with inferior judges elected for four years by their respective constituencies.[268]

The sweeping proposal by Wickliffe to abolish the Civil Law system, to discard the *Revised Statutes, Civil Code* and *Code of Practice* and to substitute the Common Law of England, would have greatly altered our legal principles.[269] The seriousness of such a proposal can best be realized when it is considered that the Civil Law system had been thoroughly infiltrated into Louisiana by continuous usage since early colonial governments. To carry his end, Wickliffe would have utilized this farce of a convention, half black and half white and composed in the main either of those too ignorant to have any idea of the distinction between the two legal systems or of those who, but recently residents of Louisiana, had followed in the wake of the Federal army to clean up whatever scraps might have been left. Fortunately this resolution was referred to the committee on schedules and ordinances where it was killed.

The committee to draft a constitution was closely divided in opinion. Five members of it submitted a majority report,[270] while the remaining four submitted a minority report.[271] Both reports resurrected the old parish courts and vested judicial power in a Supreme Court, district courts, parish courts and in justices of the peace.[272] Under each the minimum civil monetary jurisdiction of the Supreme Court was fixed at $500.00; both limited the criminal appellate jurisdiction of the Supreme Court to questions of *law* only but increased the minimum fine, necessary to be imposed for jurisdictional purposes, from $300.00 to $500.00. Under each it was the punishment which "has been inflicted" or the fine which "has been imposed" which was the test of the Supreme Court's criminal appellate jurisdiction.[273]

The majority report would have required five years practice of law *in the state* as essential for appointment to the Supreme Court, while the minority report would only have

[268] *Ibid.*, p. 89.
[269] *Ibid.*, p. 88.
[270] *Ibid.*, pp. 90-92 as to judicial provisions.
[271] *Ibid.*, pp. 102-104. as to judicial provisions.
[272] *Cf.* Art. 71 of the majority report and Art. 81 of the minority report.
[273] *Cf.* Art. 72 and Art. 82.

required the last year of such a period to have been within the state.[274] The judges of that court would have been required to refer to the particular law justifying *every* definitive judgment under the provisions of the minority report, while this would have only been required "whenever practicable" under the terms of the majority report.[275]

The two reports were widely different in their treatment of district courts and their clerks. The minority report made both these types of officials elective.[276] Under the majority report, however, these judges would have been appointive, and they, themselves, would have appointed their clerks.[277] The reports also differed, in dealing with these officials, in such matters as terms and qualifications for office.[278]

Parish judges would have been appointive under the majority report but elective under the recommendations of the minority.[279] The former provided a six year term for these judges, while the latter report prescribed only a two year term.[280] The Attorney General, district attorneys, sheriffs and coroners would all have been appointive under the proposals of the majority report but elective under the provisions of the minority; and for terms of four years under the former but for only two under the latter report.[281]

Numerous changes were of course suggested on the floor of the convention. When the majority report first came before the convention for consideration, Ludeling successfully sponsored an important amendment to the article defining the jurisdiction of the Supreme Court. Under both reports those classes of cases involving the contestation of fines, forfeitures and penalties imposed by municipal corporations did not come under the jurisdiction of the Supreme Court irrespective of amount. The amendment added that important phrase—"irrespective of amount."[282]

---

[274] *Cf.* Art. 78 and Art. 88.

[275] *Cf.* Art. 78 and Art. 88, majority and minority reports respectively.

[276] Art. 91.

[277] Art. 81.

[278] The *majority* report would have required these judges to be 30 years old and to have practiced law 5 years, the last 3 within the state. Their term would have been 6 years. The *minority* placed the minimum age at 25, the term at 3 and required but 2 years of practice in Louisiana. Arts. 82 and 92 respectively.

[279] *Cf.* Arts. 84 and 94.

[280] *Idem.*

[281] *Cf.* Arts. 90 and 91 of the majority report with 100 and 101 of the minority report.

[282] *Ibid.*, p. 152. *State ex rel Boutroue vs. Judge*, 30 La. Ann. (1878) 415, interpreted this as vesting the court with jurisdiction over both law and fact in all those classes of cases, except strictly criminal ones, coming under the appellate jurisdiction of the court. Under the 1845 Constitution the court was limited to questions of "law" not only in criminal cases but also in these cases. Another marked difference was, as pointed out by the court, that appeals in such cases would go directly to the Supreme Court even from justices of the peace in Orleans.

Also note *Stubbs vs. McGuire*, 32 La. Ann. 817, under Constitution of 1879.

In line with the minority report an attempt was made by Crane to make the Supreme Court elective, but his amendment was tabled by a vote of 38 to 32, and, although he repeated his effort while a member of the committee on style and revision, he was again unsuccessful.[283]

Under the compromise amendment offered by McMillen, the qualifications and term of office for the Supreme Court judges were fixed as are found in the adopted constitution, Article 75.[284] This only amended the majority report provisions so as to require but three of the requisite five years practice of law to have been in the state.[285]

The revision committee succeeded in securing adoption of their recommendation that the jurisdiction of the district courts in Orleans parish be expressly specified instead of being left to legislative discretion.[286] Crane succeeded in making the district judges elective[287] but Packard failed to make their clerks elective.[288] With respect to the salaries, qualifications and term of office for the district judges, only slight changes were made by the convention to the recommendations of the *minority* report.[289] The recommendations of the *majority* report, however, as to the jurisdiction of these courts outside Orleans parish were adopted with only slight changes.[290]

As to parish judges the provisions of the minority report were adopted by a vote of 49 to 20. However, as thus adopted they did not require a parish judge to be a citizen of Louisiana. The revision committee, in addition to recommending certain formal changes, secured the adoption of such a requirement.[291]

The revision committee made certain very material recommendations to the provisions of the majority report relating to the jurisdiction of these parish courts. As the article of the majority report read when it reached this committee, after having been adopted by the convention, the parish courts were given exclusive probate jurisdiction over cases involving less than $500.00, and concurrent jurisdiction

[283] *Ibid.*, pp. 158 and 251.
[284] *Idem.*
[285] *Cf.* Art. 78 of the report, Constitution, *Journal, ibid.*, pp. 90 and 251.
[286] *Ibid.*, pp. 237-252.
[287] *Ibid.*, pp. 163 and 164. The vote was 44 to 32.
[288] *Ibid.*, pp. 157, 158, 159 and 163.
[289] *Cf.* Art. 92 of the report and Art. 84 of the constitution. The term, however, was fixed at 4 years.
[290] *Cf.* Art. 88 of the report and Art. 85 of the constitution.
[291] *Ibid.*, pp. 168 and 253. *Cf.* Art. 94 of the report and Art. 84 of the constitution.

with the district courts over probate cases involving $500.00 or more.[292] The committee recommended, instead, that *all* successions in the parishes outside New Orleans should be *opened* in the parish courts but that suits by or against a succession should be brought in either the parish or the district court, as might be determined by the amount involved.[293] In other words, if the case involved $500.00 or more the district courts would have exclusive jurisdiction of such matters, but if it involved less than $500.00 the parish courts would have exclusive jurisdiction. These recommendations were adopted.[294]

The provisions of the majority report as to justices of the peace underwent little change by the convention.[295] However, the revision committee successfully proposed that appeals should lie from these justices of the peace to the parish courts where more than $10.00 was involved, instead of allowing such appeals only in cases involving more than $25.00.[296]

An attempt was made by Underwood to eliminate the requirement in Article 88 of the majority report that only "lawyers" could be appointed judges *ad hoc,* but the convention did not agree with him.[297] Upon suggestion of the revision committee, such "lawyer" was required to have the qualifications necessary for selection to the particular court in which a recusation had left the vacancy.[298] Thus an ambiguity was cleared.

It has been noted that the only difference between the majority and minority reports in dealing with the Attorney General and district attorneys was that the former report made these appointive while the latter made them elective.[299] Neither specified a term of office or compensation.[300] Wickliffe introduced a substitute article, making both offices elective for four year terms, with a salary of $5000.00 for the Attorney General and $3000.00 for the district attorneys.[301] Packard amended this substitute only to the extent of de-

---

[292] Art. 85 of the report.
[293] *Ibid.*, pp. 169, 238 and 253.
[294] *Idem.* The Court in *Swan vs. Gayle,* 21 La. Ann. (1869), 478, applied this article as changed.
[295] *Cf.* Art. 87 of the report and Art. 89 of the constitution.
[296] *Ibid.*, pp. 238 and 253.
[297] *Ibid.*, p. 169.
[298] *Ibid.*, pp. 238 and 254.
[299] *Cf.* Arts. 90 and 100 of the reports.
[300] *Idem.*
[301] *Ibid.*, p. 170.

creasing the salaries of the latter officials to $1500.00, and, as thus amended, it was adopted.[302]

Neither the majority nor minority reports, in the provisions pertaining to sheriffs and coroners, had made a distinction in favor of Orleans parish. They differed in the method of selection and in the terms.[303] Wickliffe introduced a substitute article, incorporating the elective feature of the minority report and the terms of office there prescribed but providing also for both a Civil and a Criminal Sheriff, and for two coroners, in Orleans parish. This substitute was adopted.[304] Only formal changes were made by the revision committee and this substitute, as formally amended, became Article 93 of the constitution.[305]

An additional article was proposed by Cooley and was adopted without amendment, becoming Article 94 of the constitution.[306] This introduced for the first time into the judicial provisions of our organic law a restriction against judicial power, other than a limited "committing" power, being conferred on "any officers other than those mentioned" in the judiciary title. Such a provision has been incorporated, in the same or in a modified form, in all subsequent constitutions of Louisiana.[307]

The records of the acts passed by the legislative body and the decisions of the courts form an interesting chapter in the turbulent history of the reconstruction period in Louisiana. Certain of the legislative acts pertaining to the judiciary are important not only from a structural point of view but from an historical one.

Sessions of the Supreme Court were to be held at Opelousas and Monroe, in addition to New Orleans, and provisions were made for appeals to be returnable at one of these three places.[308] Numerous acts were passed fixing the procedure in eligibility of office or contested election cases.[309] Salaries for the judges of the Supreme Court were increased

---

[302] *Ibid.*, pp. 170 and 254.
[303] *Cf.* Arts. 91 and 101 of the reports.
[304] *Ibid.*, pp. 170, 171 and 178.
[305] *Ibid.*, pp. 238, 254 and 255.
[306] *Ibid.*, p. 255.
[307] Huey P. Long, *Compilation of the Constitutions of Louisiana* (1930), p. 161, annotations under Section 8, Article VIII, Constitution of 1921; *State vs. Recorders of 1st Recorder's Court*, 30 La. Ann. 450.
[308] John Ray, *Digest of the Statutes of the State of Louisiana* (New Orleans—1870), Vol. II, pp. 59-62, Acts of 1866, No. 147, p. 278; Acts of 1870, Extra Session, No. 45, p. 99.
[309] *Ibid.*, pp. 62-68, *Acts of 1868*, No. 156, p. 199.

in 1871, but the act making the increase was repealed in 1877.[310]

Acting under the discretion permitted by Article 83 of the constitution the legislature divided the state into *fourteen* judicial districts, exclusive of Orleans parish, in each of which there was to be a district court.[311] Provision was made for the transfer of pending cases in Orleans to the seven district courts created by that article for that parish.[312] In addition to these seven district courts for that parish the legislature created an eighth in 1870, while Warmoth was Governor.[313]

In 1872, while the negro Pinchback was Governor, the Legislature abolished the Seventh and Eighth District Courts of Orleans and declared these offices vacant.[314] In their stead a new court was created, termed the *Superior District Court*.[315] In addition to the jurisdiction over election cases which had been vested in the Eighth District Court, this new court was vested with exclusive jurisdiction over suits to which the state or other political corporation was a party.[316] However, in 1877, while Nicholls was Governor, this new court was abolished.[317] All "tax" cases pending before that court were ordered transferred to the Third District Court.[318] This latter court, which under Article 83 had exclusive jurisdiction over appeals from justices of the peace in Orleans, was also in 1877 vested with certain concurrent jurisdiction over cases previously brought in other district courts of Orleans.[319]

Another district court for Orleans, termed the *Superior Criminal Court*, was created in 1874, while Kellogg was Governor.[320] This court was vested with exclusive criminal jurisdiction over cases arising in Orleans in which the punishment could exceed five years imprisonment, as well as over cases involving certain specified offenses.[321]

---

[310] *Acts of 1877*, E. S., No. 26, p. 44, repealing *Acts of 1871*, No. 36, p. 84.
[311] Ray, *op. cit.*, pp. 66-67; *Acts of 1870*, No. 13, p. 39.
[312] *Acts of 1868*, No. 7, p. 6.
[313] *Acts of 1870*, No. 2, p. 2; Ray, *op. cit.*, pp. 83-85.
[314] *Acts of 1872*, E. S., No. 2, p. 38.
[315] *Idem.*
[316] *Idem.*
[317] *Acts of 1877*, No. 61, p. 85.
[318] *Idem.*
[319] *Acts of 1877*, No. 142, p. 218. This was held constitutional in *Lord Cecil vs. Board of Liquidators*, 30 La. Ann. (1878), 34.
[320] *Acts of 1874*, No. 124, p. 220, as amended by *Acts of 1877*, No. 56, p. 72. This act was held constitutional in *State vs. Anderson*, 29 La. Ann. 774; however, section 10, which authorizes the appointment of a judge *ad hoc* in event of illness, was held unconstitutional for the reasons set forth in *State vs. Judges of the 6th Judicial District, supra. State vs. Phillips*, 27 La. Ann. 663.
[321] *Idem.*

There were numerous legislative acts pertaining to the newly created parish courts. One, seeking to vest these courts with exclusive jurisdiction over all cases either by or against a succession, irrespective of the amount involved, was held unconstitutional, as violating Article 87 of the constitution.[322] These courts were, however, given jurisdiction over suits for separation and divorce where there was no monetary demand exceeding $500.00.[323] Provision was made for the transfer of those probate "cases pending or on file," if of the class coming under the jurisdiction of the parish courts, to these courts.[324] They were given exclusive jurisdiction, except in Orleans, over matters of adoption.[325] Parish judges were even authorized to perform marriage.[326]

A quandary arose over the jurisdiction of the parish courts. Under the wording of Article 87 it would appear that the parish courts were not to have jurisdiction of cases involving less than $500.00 in principal, although with accrued interest more than that amount would be involved. Such was the holding of the Supreme Court.[327] Yet the court *also* held that the district courts could not have jurisdiction over such cases because of the provisions of Article 85.[328] Hence there appeared to be no tribunal for this limited class of cases. To correct the patent error on the part of the constitutional convention, the Supreme Court had to reverse its first decision and read into Article 87 what was not there.[329] As finally clarified, the court had by judicial legislation said that such a case could be brought in a parish court, appealed to a district court and could then be appealed to the Supreme Court.[330]

The legislature in 1868 provided that parish judges should receive no fees and that clerks of the district courts would act as *ex officio* clerks for the parish courts. This act was held to violate Articles 86 and 117 of the constitution.[331]

---

[322] *Acts of 1868*, No. 141, p. 179. *Swan vs. Gale, supra.*
[323] *Acts of 1868*, No. 51, p. 60.
[324] *Idem.* The Supreme Court held that only pending cases, not completed ones, were to be transferred; and hence held that an action to revive a probate judgment, rendered by a district court under a prior constitution, should be brought in a district court and not in a parish court. *La. Chambre & Co. vs. Cole*, 30 La. Ann. 961.
[325] *Acts of 1868*, No. 64, p. 77.
[326] *Acts of 1869*, No. 110, p. 140.
[327] *Parker vs. Shropshire*, 26 La. Ann. 87.
[328] *Badeaux vs. Blake*, 24 La. Ann. 184.
[329] *Decklar vs. Frankenheiger*, 30 La. Ann. 410.
[330] *Newman Bros. vs. Cuney*, 30 La. Ann. 1201; *Acts of 1876*, No. 28, p. 52, to be noted in this connection.
[331] *Bouanchaud vs. D'Hebert*, 21 La. Ann. 188.

The legislature then sought to accomplish its object by providing that a parish judge should receive no fees except in appeals from justices of the peace, for which he would act as his own clerk; that for all other matters the clerk of the district court for that particular parish would act as clerk and receive all fees.[332] This act was held to be constitutional.[333]

As might have been noted judges were freely legislated out of office during this period. Despite prior decisions,[334] the Supreme Court held that the abolition of the Seventh and Eighth District Courts of Orleans and the creation of their successor, the Superior District Court, were constitutional.[335]

The court attempted to retract somewhat in 1877, and explained its decision in the Clinton case,[336] by saying that "it was not intended to vary the rule announced in the two former cases of Downes and Robinson" and that it had been decided under the special provisions of the constitution pertaining to the parish of Orleans.[337] The court then proceeded to an interpretation of three acts:[338] an act of 1870 to extend the limits of the parish of Orleans so as to include therein certain portions of Jefferson parish, formerly in the Second Judicial District, and attaching these portions to the Sixth Municipal District of New Orleans;[339] the act of 1874 providing for a further extension and constituting the annexed portion, formerly a part of Jefferson parish, a part of the Seventh Municipal District of New Orleans.[340] This latter act, however, stipulated that the annexed portion would remain under the jurisdiction of the Second Judicial District Court for Jefferson parish.[341] The third act discussed was passed in 1876, while Kellogg was Governor, and attempted to constitute the entire Sixth and Seventh Municipal Districts of New Orleans as a part of the Second Judicial District,[342]

---

[332] *Acts of 1869*, No. 110, p. 140.
[333] *Hawley vs. Barlow*, 21 La. Ann. 563.
[334] *City of New Orleans vs. Lea*, *State ex rel Downs vs. Towne* and *State ex rel Robinson vs. Dranguet*, *supra*, p. 84.
[335] *State ex rel vs. Clinton*, 26 La. Ann. (1874), 406.
It might be of interest to note that the conduct of Ludeling, the Chief Justice of the Supreme Court who had been appointed under the Constitution of 1868, was of such a character that the United States Supreme Court had termed his part in the Louisiana Railroad case to be "a fraud." *Jackson vs. Ludeling*, 21 Wallace 629.
[336] *State ex rel vs. Clinton*, 26 La. Ann. 406.
[337] *Lafayette Fire Ins. Co. vs. Remmers*, 29 La. Ann. (1877), 419.
[338] *Idem.*
[339] *Acts of 1870*, E. S., No. 7, p. 80.
[340] *Acts of 1874*, No. 71, p. 119.
[341] *Idem.*
[342] *Acts of 1876*, No. 45, p. 86.

and thus to legislate the judge of the First Judicial District out of office.

The court intimated by *dicta* that under the first two of these acts the annexed portion would come under the jurisdiction of the First Judicial District Court but only after the expiration of the terms of the incumbent judges of the Second Judicial District Court;[343] that the act of 1876 could not place these annexed portions, or for that matter any of the territory in the Sixth and Seventh Municipal Districts of New Orleans, again under the jurisdiction of the Second Judicial District Court until the expiration of the terms of the incumbent judges then having jurisdiction.[344] Yet in another case the court held that this act of 1876 went into immediate effect insofar as pertaining to the *Seventh* Municipal District of New Orleans.[345] The latter act was repealed in 1877, however, when Nicholls became Governor.[346]

Indication of the return to the principle of freedom of judges from legislative action was further shown by the decision of the Supreme Court allowing former Judge Collins his salary for the balance of his term,[347] even though the legislative act abolishing his office before expiration of his term had been held constitutional in the Clinton case.[348] The final return to the principle of non-legislative interference was made in 1880.[349]

There were frequent changes made by the legislature as to justices of the peace and other inferior judicial officers for New Orleans. In addition to the six justices of the peace for Orleans which had been created under authorization of the constitution, the legislature in 1871, and while Warmoth was Governor, provided for a seventh.[350] Still an eighth justice of the peace was provided for in 1877 while Nicholls was Governor.[351]

Six recorders courts were created for Orleans parish in 1870.[352] They were soon after abolished, while Kellogg was Governor, and four municipal police courts created in their

[343] *Lafayette Fire Ins. Co. vs. Remmers*, supra, p. 54.
[344] *Idem.*
[345] *State vs. Williams*, 29 La. Ann. (1877), 779.
[346] *Acts of 1877*, E. S., No. 85, p. 124.
[347] *State ex rel Collins vs. Jumel*, 30 La. Ann. (1878), 861.
[348] *Supra*, p. 54.
[349] *State ex rel Collins vs. Burke*, 32 La. Ann. 1214.
[350] *Acts of 1871*, No. 82, p. 198.
[351] *Acts of 1877*, E. S., No. 59, p. 99.
[352] *Acts of 1870*, E. S., No. 7, Sec. 81.
Recorder courts had been created for Jefferson City and Shreveport. Ray, *loc. cit.*, pp. 116 and 119, *Acts of 1868*, No. 77, p. 107, and *Acts of 1869*, No. 122, p. 144.

stead.[353] A fifth municipal police court was created for Carrollton suburb in 1874.[354] However, in 1877, these police courts were abolished and, in lieu thereof, the First and Second Recorders Courts were created.[355] Each was to have two judges selected for only two year terms.[356] A justice of the peace was to perform the functions of the old Fifth Municipal Police Court.[357]

Certain other decisions of the Supreme Court during this period of reconstruction are of interest in a study of this nature. There were many cases involving conflicting appointments made in 1872 and 1873 by Kellogg, Warmoth and Pinchback.[358] The best known was that involving the conflicting claim by John H. Kennard and Phillip Hickey Morgan to a seat on the Supreme Court.[359] Warmoth had appointed Kennard, during a recess of the Senate, to fill a vacancy on the Supreme Court caused by the resignation of W. W. Howe. Under Article 61 of the constitution such recess appointment expired "at the end of the next session" of the Senate. Subsequent to this appointment a special session was called, but before this nomination could be placed before the Senate it had impeached Warmoth. When the regular session next convened Lieutenant-Governor Pinchback, a negro, was acting Governor because of Warmoth's impeachment. Pinchback nominated Morgan for this same vacancy on the Supreme Court, and the Senate confirmed that nomination. The court sustained Morgan, holding that the portion of Article 61 above quoted referred to either regular or special sessions.[360] The decisions in that case should be compared with recent decisions by the present Supreme Court of Louisiana,[361] to be discussed in the treatment of the Constitution of 1921.

Although certain decisions interesting from a structural viewpoint could be commented upon,[362] few contributions

[353] *Acts of 1873*, No. 95, p. 170.
[354] *Acts of 1874*, No. 71, Sec. 6, p. 221.
[355] *Acts of 1877*, E. S., No. 131, p. 199.
[356] *Idem.*
[357] *Idem.*
[358] *Kemp vs. Ellis*, 25 La. Ann. (1873), 253.
[359] *State ex rel P. H. Morgan vs. J. H. Kennard*, 25 La. Ann. (1873), 239, Wylie, dissenting; affirmed 92 U. S. 480, 23 L. Ed. 478.
[360] *Idem.*
[361] *State vs. Dowling*, 167 La. Ann. 907, and *State vs. Irion*, 169 La. Ann. 481.
[362] An amount demanded by a city as contribution for sidewalk paving is *not* a "tax, toll or impost." *Rooney vs. Brown*, 21 La. Ann. 51. Nor is a charge of 10c a bale for inspecting hay brought to the port of New Orleans. *Board of Hay Inspectors vs. Pleasants*, 28 La. Ann. 349. But a charge of 25c a day by a town for keeping a private butcher stand is a "tax." *Delcombe vs. Clere*, 34 La. Ann. 1050.
Questions of continuances and grounds for motions to quash an indictment depend solely on "facts" and, being criminal, can not be examined by the Supreme Court. *State vs. Watkins & Nelson*, 21 La. Ann. 290; nor can an order of a district judge overruling a motion for a new trial on new evidence. *State vs. Gregory*, 21 La. Ann. 471.

were made to the judicial landmarks during this troubled period. A study of the personalities of the bench would no doubt give an insight into certain of the decisions, but the scope of this study will not permit this digression.

What outstanding changes were made in the judiciary under this Constitution of 1868? This constitution revived, *in our organic law,* the parish courts, although, under the Constitution of 1864, the creation of inferior courts had been a matter of legislative discretion. There was a return towards the elective principle, as under this Constitution of 1868 only the Supreme Court was still appointive.[363]

Aside from these features the judicial provisions of the Constitution of 1868 appear very similar to those of its immediate predecessor. There were, of course, certain changes in jurisdiction, term of office, salaries and manner of removal.

The legislative acts and decisions of the Supreme Court under this Constitution of 1868 and during this period of *reconstruction* contributed little but a vivid picture of the fraud and incompetency then prevalent.[364] That period perhaps witnessed greater control and abuse of the judiciary by legislative and executive authority than any other in the history of Louisiana.

---

[363] Art. 75, in Thorpe, *op. cit.*, p. 1458.

[364] Ella Lonn, *Reconstruction in Louisiana After 1868,* (New York and London—1918), p. 392, says that the legislature abolished the parish courts in 1876. It is submitted that such a statement is an error. Such courts were of constitutional creation and could not have been abolished save by constitutional amendment. Then, too, *Act 28 of 1876* extended the jurisdiction of these courts, in the same year as the date given by Lonn for their abolition by the legislature.

PART IV

THE JUDICIARY AFTER RECONSTRUCTION

The Constitution of 1879

A prelude to the Constitutional Convention of 1879 would not be complete without reference to those periods of "dual government" marking the high points in the closing years of "reconstruction" in Louisiana. The oppressed Democrats had not, of course, been idle during this period of "carpetbag" rule in the state but had been using every weapon in their power to regain control. In 1872 occurred a break between rival factions of the Republicans, which had long been brewing and which was seized by the Democrats to further their purpose. Through a fusion with the Warmoth faction of the Republican party, John McEnery, Democrat, was nominated for Governor in opposition to William P. Kellogg, a "Custom House" Republican. The elections of 1872 were hotly contested, and both sides claimed victory.[365] The result was the installation of two Governors and two legislatures; and the impeachment of Warmoth, clashes of arms and recognition of the Kellogg government by the Federal authorities followed with bewildering rapidity.[366]

With the election of 1876, however, the tide was finally turned and the long rule of the carpetbaggers in Louisiana broken. In this election Francis T. Nicholls and Lewis A. Wiltz, Democrats, opposed S. B. Packard and C. C. Antoine, both negro Republicans, for the office of Governor and Lieutenant-Governor respectively.[367] An attempt was made by the Kellogg-Packard faction, through its returning board, to claim success at the polls, and " . . . a Democratic majority of

---

[365] Lonn, *op. cit.*, pp. 188-205, *passim*. The decision in *State vs. Jack Wharton*, 25 La. Ann. 14, discloses machination of the "Lynch Returning Board," the organ of the "Custom-House" faction in seizing control and likewise shows the favorable attitude of the Supreme Court towards that faction. "Relatives of three Supreme Court judges held office at the hands of Pinchback . . ." and ". . . it was known that the judges were in sympathy with . . ." Kellogg. Lonn, *ibid.*, p. 220.

[366] *Ibid.*, pp. 206-245, *passim*.

[367] Warmoth, *op. cit.*, p. 288; Lonn, *op. cit.*, pp. 408-472, *passim*.
Nicholls had sacrificed an arm under Stonewall Jackson and lost a leg at Chancellorsville. "He had the respect and confidence of Democrats and Republicans alike, of white men and of many negroes. He was no politician, but his incorruptibility, his fearlessness and firmness, combined with great innate modesty appealed to everyone." *Ibid.*, p. 411.

7639 was converted into a Republican majority of 3437" by this board.[368] Nicholls, however, seized the government, and this Packard Government dissolved when President Hayes refused to intercede.[369] With this act, reconstruction in Louisiana ended.

Upon restoration to power, the Democrats naturally demanded the framing of a new constitution, and, on April 21, 1879, Governor Nicholls called a constitutional convention to order. This convention, numbering one hundred and thirty-one delegates, chose Lieutenant-Governor Wiltz as its President.[370] A judicial committee of twenty was appointed on April 28,[371] and this committee made its report on July 7.[372]

This report vested judicial power in a Supreme Court, courts of appeal, district courts and in justices of the peace, and all these officials were to be appointive. Deviations were made by the convention, however, from this method of selection, although the Supreme Court was made appointive.[373] A compromise method of selection of judges for the courts of appeal, however, was adopted on motion of Mr. Cunningham after Mr. Knoblock had proposed to make these elective.[374] Under this amendment these judges were to be selected by the joint action of both houses of the legislature.[375] McConnell proposed that this choice be from a list of candidates recommended by the Supreme Court, but this proposal was tabled.[376]

A method for the selection of district judges by joint action of both houses was likewise proposed by Mr. Cunningham.[377] The convention, however, overwhelmingly adopted the amendment offered by Mr. Bridgers making these judges

---

[368] Lonn, *ibid.*, p. 460.

[369] *Ibid.*, pp. 488-525, *passim*. Warmoth claimed that "concessions" were made to the Republicans; that Kellogg was made a U. S. Senator; that Packard was appointed by Hayes to the Consul-Generalship at Liverpool; and that the brother of Pinchback was made a tax-collector by Nicholls. Warmoth, *op. cit.*, pp. 238 and 239.

[370] *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana*, 1879 (New Orleans—1879), p. 5.
Among the delegates were Chas. Phalanges, Felix P. Poche and N. C. Blanchard, all of whom later served on the Supreme Court created under this Constitution of 1879.

[371] *Ibid.*, p. 45; composed of Thos. J. Semmes, James McConnell, Frank McGloin, Gustave A. Breaux, Victor Oliver and Don A. Pardee, all of Orleans; T. T. Land, Chairman, of Caddo; Robert E. Todd, of Morehouse; Thos. B. Lyons, of East Feliciana; M. J. Cunningham, of Natchitoches; A. B. George, of Webster; R. W. Richardson, of Ouachita; Donelson Caffery, of St. Mary; M. E. Girard, of Lafayette; Clay Knoblock, of Lafourche; E. Simon of St. Martin; F. R. King, of Vermilion; A. S. Herron, of East Baton Rouge; H. S. Steele, of Tensas. Mr. Palange was later added. *Ibid.*, p. 60.

[372] *Ibid.*, p. 248.

[373] Art. 82, Thorpe, *op. cit.*, p. 1484.

[374] *Ibid.*, pp. 269 and 290.

[375] Art. 96 of the Constitution, in Thorpe, *op. cit.*, p. 1486.

[376] Journal, pp. 269 and 270.

[377] *Ibid.*, p. 272.

elective,[378] except that the district judges for Orleans parish were made appointive.[379] Justices of the peace were also made elective instead of appointive, contrary to the recommendations of the judiciary committee.[380]

The next most interesting proposals made in the convention at variance with the report of the judiciary committee concerned questions of jurisdiction and powers of the courts. Although the report marked a large expansion in the nature of the Supreme Court's appellate jurisdiction, providing as it did for that court to have appellate jurisdiction over "suits for divorce and separation from bed and board," Mr. Parlange sought to further expand its jurisdiction so as to include suits "for nullity of marriage, filiation and interdiction."[381] His efforts were unsuccessful, however, as his amendment was tabled by a vote of 58 to 32.[382] It should be noted, however, that an amendment adopted in 1884 expressly vested in the Supreme Court appellate jurisdiction over suits for nullity of marriage, over suits involving the right to a homestead and over suits for interdiction, although the same amendment placed the necessary monetary minimum at $2000.00 instead of $1000.00.[383]

It was unsuccessfully urged by Mr. Forman that the Supreme Court be empowered to issue writs of habeas corpus *in all cases* to persons in actual custody, instead of only possessing that power in cases over which it had appellate jurisdiction.[384] He also urged that the supervisory power vested in the Supreme Court under the recommendations of the committee be broadened so as to expressly confer *original* jurisdiction in that court to issue the remedial writs enumerated.[385] This attempt also failed.[386]

The provisions of the report specifying the jurisdiction of the courts of appeal were amended on the floor of the convention. A possibility of confusion was eliminated by the amendment of Mr. Wells, which expressly specified that these courts were to have appellate jurisdiction in *both* civil and

[378] *Ibid.*, pp. 271, 272 and 273.
[379] *Ibid.*, pp. 279 and 280.
[380] *Ibid.*, p. 277.
[381] *Ibid.*, p. 267.
[382] *Idem.*
[383] Amendment to Art. 81, adopted April 22, 1884, in *Acts of 1884*, pp. 77-78. This "homestead" was interpreted in its technical meaning by the court in *State ex rel Davidson vs. Judge*, 37 La. Ann. 109.
[384] *Journal*, p. 268.
[385] *Idem.*
[386] *Idem.*

probate cases within the requisite jurisdictional amounts—in excess of $200.00 and not in excess of $1000.00.[387] Their jurisdiction was further broadened under the amendment to the report offered by Mr. Knoblock. This amendment provided that, in determining whether a sufficient monetary amount was involved, "the fund to be distributed" might govern, as well as the actual amount of the "matter in dispute."[388] This extension, appearing in the organic law for the first time, was greatly restricted by interpretations of the Supreme Court.[389] The effort of Mr. Parlange to include also "costs" in determining the jurisdictional amount was tabled.[390]

The constitutional amendment of 1884, previously referred to, further broadened the jurisdiction of these courts of appeal. To conform with the change made in the appellate jurisdiction of the Supreme Court the monetary maximum for the courts of appeal was raised from $1000.00 to $2000.00, while their minimum was at the same time lowered from $200.00 to $100.00.[391]

The power of the judges of these courts of appeal, and also of the district judges, to issue writs of *habeas corpus* was confined to their respective territory by virtue of the amendments offered to the committee report by Messrs. Pardee and Webb.[392] Blanchard, however, succeeded in conferring upon these courts of appeal the power to issue certain remedial writs in aid of their appellate jurisdiction.[393]

The criminal jurisdiction of the justices of the peace was a moot question in the convention. A drastic extension beyond the recommendations of the report was proposed by Mr. Elam, for he sought to empower these justices to bail in all cases not capital. [394] This proposal was tabled, but Mr. Herron did succeed in vesting justices of the peace with the power to *discharge* prisoners in all cases in which such prisoners could be allowed bail by them.[395]

---

[387] *Ibid.*, p. 270.
[388] *Idem.*
[389] *Succ. of Jean Duron*, 34 La. Ann. 585, *Succ. of Gohs* 37 La. Ann. 428, and *In Re Southern Liquor & Tobacco Co.*, 49 La. Ann. (1897) 1455. These cases held in effect that even though a fund to be distributed, for example by an administrator, exceeded the jurisdictional amount, if the particular claim or claims against which an opposition was filed did not, the monetary requirement has not been satisfied.
[390] *Journal*, p. 289.
[391] Amendments, Art. 95, in *Acts of 1884*, p. 78.
[392] *Journal*, pp. 270 and 272; Arts. 104 and 115 of the constitution, Thorpe, *op. cit.*, pp. 1489 and 1490.
[393] *Ibid.*, p. 279; Art. 104, Thorpe, *op. cit.*, p. 1489.
[394] *Ibid.*, p. 277.
[395] *Idem;* Art. 126, Thorpe, *op. cit.*, p. 1498.

There were many conflicting proposals made in the convention as to salaries and terms of office. Davidson failed to amend the report so as to reduce the salary for judges of the Supreme Court from the recommended sum of $5000.00 to that of $4000.00.[396] Proposals by Messrs. Marshall, Stevenson and Ogden to decrease by varying amounts the proposed salary of $4000.00 for the judges of courts of appeal outside Orleans was tabled.[397] The salaries for the judges of the Orleans Court of Appeals were, however, decreased from $5000.00 to $4000.00, through amendment offered by Mr. Stringfellow to the report.[398] Davidson secured a similar reduction as to judges of the district courts for Orleans.[399]

There were numerous recommendations as to compensation for the Attorney General,[400] but the salary of $3000.00 proposed in the report was adopted.[401] Slight changes to the report were made by the convention with respect to the compensation to be allowed sheriffs.[402]

A tenure of eight years for district judges had been recommended by the committee, but with a vote of 66 to 31 the convention adopted an amendment offered by Mr. Lott decreasing these terms to four years.[403] The terms for the judges of the courts of appeals were made overlapping through an amendment offered by Forman to the report.[404]

Various other proposals at variance with the report of the judiciary committee were made by the delegates, and certain of these are of interest. For example, Mr. Pardee attempted to take from the legislature its power of "removal by address" of judges.[405] Such a proposal was but an illustration of the profound distrust of the legislature occasioned by the bitter experiences of legislative waste and abuse during reconstruction. Because of this profound distrust the constitution adopted by the Convention of 1879 is remarkable

[396] *Ibid.*, p. 267.
[397] *Ibid.*, pp. 270 and 271.
[398] *Ibid.*, p. 277.
[399] *Ibid.*, pp. 279 and 280.
[400] Stringfellow proposed to allow the Attorney General fees; Webb sought to raise his salary to $4,000.00, while Forman wished a raise to $3,600.00. All these proposals were tabled. *Ibid.*, p. 269.
[401] *Idem.*
[402] The maximum salary to be paid sheriffs of the "country" parishes for criminal services was raised on amendment of Sutherlin from $300.00, as recommended in the report, to $500.00; Caffery succeeded in limiting their fees as *ex officio* tax collectors to 5% of amounts collected and paid over. *Ibid.*, pp. 274 and 275. The Criminal Sheriff of Orleans was denied fees and his salary cut to $3,600.00 under amendments offered by McGloin and Cunningham to the report. *Ibid.*, p. 282.
[403] *Ibid.*, p. 272.
[404] *Ibid.*, p. 270.
[405] *Ibid.*, p. 268.

for its limitations on legislative discretion. Practically all special legislation was prohibited.[406] The particular proposal by Pardee, however, was tabled and this power of "removal by address," which first appeared in the Constitution of 1845,[407] has remained in our organic law, although the requisite majorities have varied.[408]

It should be recalled that the courts of appeal, created for the first time by this constitution, were to be each composed of only two judges, and that the concurrence of *both* was necessary to disturb a decision of a lower court.[409] To relieve the rigidity of this provision Forman proposed that these courts of appeal be permitted to certify disputed points to the Supreme Court when both judges were unable to concur.[410] It was suggested by George and Cunningham that *partial* concurrence be permitted.[411] These suggestions were all tabled.[412] However, an amendment was adopted in 1884 to this Article 101 of the constitution to the effect that, instead of a decision being affirmed in event of disagreement by the two judges of a court of appeals, an attorney having the qualifications required of such judges would be called in to break the deadlock.[413]

The provision found in Article 116 of the constitution permitting the legislature to provide for verdicts in *civil* cases by less than a unanimous jury was inserted through an amendment offered by Oliver to the committee report.[414] Demas opposed its adoption and recorded his vote in the journal against it.[415]

As recommended by the report any district judge could be called in by the Supreme Court to temporarily serve in place of a recused justice of that court.[416] Mr. Parlange failed in his attempt to have a district judge from whose decision an appeal was before the court ineligible for such service.[417]

---

[406] Art. 46, Constitution of 1879, Thorpe, *op. cit.*, pp. 1478-1479.
[407] Art. 78, Constitution of 1845, *ibid.*, p. 1401.
[408] Long, *op. cit.*, pp. 822 and 828.
Messrs. Pardee, August Bulow, W. F. Loan, Mayer Cohen, Wade H. Hough and James Mathews entered in the *Journal* their protest against the "unusual methods" authorized for removal of judges. *Ibid.*, p. 886.
[409] Arts. 96 and 97, Thorpe, *op. cit.*, p. 1486.
[410] *Journal*, p. 270.
[411] *Idem.*
[412] *Idem.*
[413] Amendments, Art. 101, *loc. cit.*, p. 78.
[414] *Journal*, p. 278.
[415] *Idem.*
[416] *Ibid.*, p. 267.
[417] *Idem.*

In passing, it should be noted that the report had recommended a minimum of twenty and a maximum of fifty-seven judicial districts for district courts and had itself created twenty-six districts, to remain until varied within the above limitation.[418] Mr. Davidson failed to amend so as to fix the minimum at sixteen and the maximum at thirty-six;[419] Ogden, however, did succeed in fixing the maximum at thirty.[420]

Aside from those of the constitutional amendments of 1884 which have been previously commented upon, there were certain other amendments adopted that same year affecting the judicial structure of Orleans. Instead of allowing a decision by either of the three city courts of New Orleans to be final if in a case involving not more than $100.00,[421] this amendment provided that an appeal would lie to the Civil District Court if more than $25.00 was involved.[422] By an amendment of that same year many detailed provisions as to judicial expenses and control of the judicial expense fund of Orleans were inserted in the organic law.[423]

Comparison of the judicial provisions in the Constitution of 1879 with those in prior constitutions discloses that perhaps the most notable feature was the creation for the first time of intermediate courts of appeal.[424] In addition, a return was made to the principle that the criminal jurisdiction of the Supreme Court would be determined by the punishment which *could be* inflicted, not that which actually had been inflicted.[425]

The state was divided into Supreme Court districts, from which judges of that court were to be appointed.[426] Only in the Constitution of 1852 had such a districting appeared in organic law.[427] That latter constitution had, it will be remembered, made the court elective, but even though the in-

[418] *Ibid.*, p. 271. *Act 71 of 1882* added an extra judge to the 1st District; *Act 22 of 1882* added an extra one to the 12th; *Act 69 of 1890* divided the state into 22, instead of 26, districts and with all except the 10th to have only one judge; *Act 88 of 1894* created a 23d district; *Act 172 of 1894* created a 24th; and *Act 114 of 1894* added an extra judge to the 1st district.

[419] *Ibid.*, p. 271.

[420] *Idem.*

[421] Arts. 130 and 135, Thorpe, *op. cit.*, pp. 1494 and 1495.

[422] Amendments, Art. 130, *ibid.*, pp. 79-80.

[423] Amendment to Art. 146, *ibid.*, p. 80.

[424] Arts. 95 through 106, *ibid.*, pp. 1486, 1487, and 1488.
Act 10 of 1880 prescribed causes for recusation of court of appeals judges and provided for trial in such cases. *Act 2 of 1884* provided that vacancies among court of appeal judges occurring during a recess of the legislature were to be filled by executive appointment until the "next session," at which a successor would be chosen.

[425] Art. 81, *ibid.*, p. 1483. The Constitution of 1868 had alone provided the contrary test. Art. 74, Constitution of 1868, *ibid.*, p. 1418.

[426] Arts. 82 and 83, Constitution of 1879, *ibid.*, p. 1483.

[427] Art. 64, Constitution of 1852, *ibid.*, p. 1458.

tervening constitutions made this court appointive, these appointments had, by custom and courtesy, been from different sections of the state.

It is perhaps pertinent at this point to mention an act of the legislature in 1894 which confined the sessions of the Supreme Court to New Orleans.[428] After the passage of this act the Supreme Court ceased "going on circuit." Specific districting of the state for the district courts first appeared in this Constitution of 1879.[429]

It has already been commented upon in this study that provisions empowering the Supreme Court with "control and general supervision" over inferior courts first appeared in this constitution.[430] This meager beginning has been enlarged in every subsequent constitution.[431] The Constitution of 1879 omitted any reference to parish courts, which had been revived by that of 1868, and the creation of such courts was not permitted the legislature. The parish court system has never reappeared in the Louisiana judicial structure.

In sharp contrast to the provisions of its predecessor, the Constitution of 1879 contained unique provisions for the courts in Orleans parish and in the city of New Orleans. It will be remembered that this Constitution of 1868 had only briefly dealt with courts in Orleans, aside from making them elective, and allowed the legislature a wide discretion thereto. Seven district courts for Orleans parish were established by that Constitution of 1868, but the rapid changes made by the legislature under the discretion permitted it have been shown.[432] The Constitution of 1879, on the contrary, only created *two* district courts for that parish, a civil and a criminal one.[433] The legislature was forbidden to create any additional ones, although it could increase the number of judges on the Civil District Court from five to nine, and the number for the Criminal District Court from two to three.[434] Legislative abuse or change as to incumbents was absolutely prohibited.[435]

---

[428] *Act 69 of 1894.*
[429] Art. 108, in Thorpe, *op. cit.*, pp. 1488 and 1489.
[430] *Supra*, p. 38.
[431] Long, *op. cit.*, pp. 176 and 177.
[432] *Supra*, pp. 52, 54-55.
[433] Art. 130, Thorpe, *op. cit.*, p. 1494. *Act 98 of 1880* organized the Criminal District Court, and Act *117 of 1890* empowered judges of one division to try cases allotted to another, in event of absence for any cause other than vacancy or recusation. *Act 39 of 1880*, as amended by *Act 23 of 1882*, provided rules as to trials and dockets in the Civil District Court.
[434] Arts. 130 and 131, *ibid.*, p. 1494.
[435] Art. 114, *ibid.*, p. 1490.

Three city courts for New Orleans were created; however, the legislature could increase the number not to exceed eight.[436] In 1880 a *fourth* city court was added by the legislature.[437] The constitutional amendment adopted in 1884, previously referred to, incorporated this added city court, in addition to making the slight change in jurisdiction already described.[438]

The judges of the court of appeals for Orleans were to be selected by joint vote of both houses of the legislature.[439] Those of the two district courts were to be *appointed* by the Governor,[440] although it is to be recalled that district judges for the "country" parishes were elective.[441] Judges of these city courts, however, were to be popularly elective.[442] These latter were in lieu of justices of the peace for Orleans. The legislature was permitted, however, to create recorder courts for New Orleans but could not vest these with jurisdiction beyond enforcement of municipal ordinances.[443]

Certain of the decisions under this Constitution of 1879 have been given, but there are others also of interest in studying the judiciary. The appearance for the first time of a "supervisory power" in the Supreme Court raised many problems. Almost immediately that court was flooded with applications to it for review in innumerable classes of cases. To escape the limitless task these would have occasioned, the court, however, said that this new authority vested by Article 90 to issue remedial writs in the aid of this supervisory jurisdiction "is addressed to the sound discretion of the Supreme Court and should be most carefully exercised, and only in cases where there is a flagrant usurpation of power, or where serious injury may occur to parties to whom no other

---

[436] Art. 135, *ibid.*, p. 1495. *Act 45 of 1880* organized these courts.

[437] *Act 67 of 1880.*

[438] *Amendment to Art. 135*, adopted 1884.

[439] Art. 128, Thorpe, *op. cit.*, p. 1493.
Under Art. 81, before being amended, the Supreme Court was vested with jurisdiction over cases involving *in excess* of $1,000.00 in principal; under Arts. 128 and 129 it had been provided, through error, that the court of appeals for Orleans would have jurisdiction if *less than* $1,000.00 in principal was involved. Hence no tribunal apparently existed for hearing an appeal arising in Orleans if *exactly* $1,000.00 in principal was involved. To "carry out the glaring intentions" of the convention the court read "less than" out and inserted "if not in excess of." *La. Ice Co. vs. State*, 32 La. Ann. 597.

[440] Art. 130, *ibid.*, p. 1494.

[441] Art. 109, *ibid.*, p. 1490.

[442] Art. 135, *ibid.*, p. 1495.

[443] Art. 136, *ibid.*, p. 1495. *Act 90 of 1888*, Secs. 45-51, and *Act 45 of 1896*, Secs. 68-71, provided for four recorder courts, with elective judges.

remedies are afforded, or where the intermediate courts are without power to grant relief.'"[444]

It was early held that the courts of appeal were amenable to this supervisory control by the Supreme Court, as "in that respect and for that purpose they are 'inferior courts.'"[445] Judicial definition of "taxes," in the light of jurisdictional questions, was further formulated by the decisions under the constitution.[446]

A splendid discussion of the development in Louisiana of criminal appellate jurisdiction and the procedure in connection with criminal appeals appears in the case of *State vs. Seiley,* decided in 1889.[447] The court, in reviewing the jurisprudence on these points, called attention to the fact that upon creation by the legislature of the Court of Errors and Appeals in 1843, the "statute provided that the court should 'have only appellate jurisdiction with power to review questions of law; which questions shall be presented by bills of exception, taken to the opinions of the judge of the lower court, or by assignment of errors apparent on the face of the record, taken in the manner and form as now provided by law for appeals in civil cases.'"[448] This act was interpreted[449] as requiring that "the appellant would have to spread upon the record, in a synopsis to form part of the bill of exception, such an amount of testimony as to enable the Supreme Court to pass on those questions of law dependent on mixed questions of fact."[450] A similar doctrine was held under the Constitution of 1845.[451]

"Such was the settled construction which was placed upon the statute of 1843, first, and upon the Constitution of 1845, afterwards, and it remained undisturbed by any contrary opinion until the year 1850. But during the following

---

[444] *State vs. Falls, Justice of Peace,* 32 La. Ann. 553. *State vs. Skinner, Judge,* 32 La. Ann. 1092, is also to be noted; also pp. 19, 26 and 27, *supra.*

However, in *Brouillette vs. Judge,* 45 La. Ann. 248, the court held that the Supreme Court would, under its supervisory power, take jurisdiction as to the "validity of a change of venue in a case which might or might not be appealable" and even before trial.

[445] *State vs. Judges of Court of Appeals,* 33 La. Ann. 358.

[446] Supplementing cases on pp. 31, 32 and 48, *supra.*

Assessments for building levees are such "taxes." *State ex rel Hill vs. Judges,* 46 La. Ann. 1292; but local "dog taxes" under a city ordinance authorizing killing of dogs found without collars purchased from the city are not, *Suthon vs. Houma,* 46 La. Ann. 1561; nor are paving assessments where predicated upon assent of owner, *Fayssoux vs. Denis,* 48 La. Ann. 850; though such paving assessments would be such a "tax" if predicated upon a legislative fiat and without assent of the property owners, *City of Shreveport vs. Prescott* 51 La. Ann. 1895.

[447] 41 La. Ann. 143.

[448] *Idem.*

[449] *Idem;* citing *State vs. Adams,* 8 Rob. 571, and *State vs. Charlot,* 8 Rob. 529.

[450] *State vs. Seiley, supra.*

[451] *Idem;* citing *State vs. Fort,* 2 La. Ann. 837, and *State vs. Brown,* 4 La. Ann. 505.

twenty years it was modified by differing decisions of this court, so that it became a rule equally well established that it would examine no questions of fact which appertained to the exercise of any discretion on the part of the trial judge, especially with reference to the granting of continuances and the allowance of new trials, holding that its jurisdiction in criminal cases only extended to 'unmixed questions of law.' This interpretation was pushed to the extremity of holding, in several cases, that a bill of exception detailing the evidence adduced before the trial judge to serve as a basis for the introduction of dying declarations 'presented questions of fact and not of law alone' and for that reason the court declined to consider it and decide the question of law it tendered.''[452]

However "soon after the organization of this court, under the Constitution of 1879, containing the same provisions as that of 1845 . . . ," the court "held[453] that 'the inhibition does not extend to the questions of law based upon the facts submitted to and determined by the judge.' " This was not a new departure but . . . "only a return to the ancient landmarks of jurisprudence. Ever since that opinion was handed down, it has been the leading case on that question, and the doctrine therein has been applied with practical unanimity in all cases decided thereafter.''[454]

The court in the Seiley case held, in conclusion, that the accused was entitled "to have the testimony of witnesses, introduced by the state for the purpose of laying the basis for the admission in evidence of dying declarations, reduced to writing for the purpose of having it annexed to a bill of exceptions and brought up in the transcript for review by this court, in order to obtain a ruling upon a question of law upon which he relies for relief.''[455]

Certain other decisions should be commented upon before concluding with this Constitution of 1879. The Supreme Court disclaimed jurisdiction of an action for nullity of a judgment rendered by it in affirming a decision of a district court, saying that as such action was an *original* one and not within the exceptional cases over which the Supreme Court was vested with original jurisdiction, such action could only

[452] *Idem;* citing *State vs. Ross and Rogers,* 18 La. Ann. 340.
[453] *State vs. Seiley, supra.*
[454] *Idem.*
[455] *Idem;* Justice Fenner dissenting.

be brought in the court of first instance.[456] This decision impliedly repudiated an earlier case decided by Judge Martin, which held the trial court *not* to have jurisdiction in such an action.[457] Yet years later the Supreme Court cited this Meloncton case approvingly and said that "there has been no change in the law" since.[458]

The articles of the constitution defining the original jurisdiction of inferior courts were held to be "not subject to the rigorous construction applicable to those defining the jurisdiction" of the Supreme Court . . . "but must be construed with reference to Article 11 of the constitution which guarantees adequate remedy in the courts for all legal rights."[459]

Thus is finished the picture of a transformed judiciary. The jurisdiction of the Supreme Court had been further broadened, and, at the same time, that court had been given a "supervisory power" over inferior ones for the first time. Another innovation, the creation of intermediate courts of appeal, has been subsequently enlarged upon. Also from this period dates the continuous session of the Supreme Court, during its term, at one city and, hence, the end of the "circuit riding." The lengthly insertion of legislative detail concerning the judiciary of Orleans parish, was the result of legislative abuse under reconstruction and has continued as a precedent to be enlarged upon by every subsequent convention.

The Constitutions of 1898 and of 1913

It may be safely said that the primary reasons leading to the calling of the new constitutional convention in 1898 were the prohibition of lotteries, the complete disfranchisement of the negroes, and the reform of the judiciary with the view of decreasing the cost of trials. All objects were attained. The interesting Louisiana State Lottery Company, although it had a far reaching effect on the political life of the state from 1868 to 1893, is beyond the scope of this study. Only passing comment can be made of the method employed by the convention framing the Constitution of 1898 to disfranchise the negro. The "grandfather clause" is well known to political historians; the de-

[456] *Walker vs. Barelli*, 32 La. Ann. 1159.
[457] *Meloncton vs. Broussard*, 2 Louisiana 8.
[458] *Gajan vs. Patout & Burguieres*, 135 Louisiana (1914) 156-172.
[459] *State ex rel Mayor vs. Judge*, 35 La. Ann. 687.

sions of the United States Supreme Court holding such suffrage clauses unconstitutional are also matters of common knowledge, as are the methods presently used by the southern states in assuring a white electorate.

The legislature in 1896 submitted to the voters of Louisiana the proposition of holding a constitutional convention.[460] That proposition was ratified, and, pursuant thereto, the convention which was elected assembled in New Orleans on Tuesday, February 8, 1898.[461] Included among the one hundred and thirty-four delegates composing the convention were many whose names are associated with political honors.[462]

For president of the convention, E. B. Kruttschnitt, of New Orleans, was unopposed.[463] In his inaugural address, Mr. Kruttschnitt paraphrased the problems before the convention and the wishes of the people as to lines of general policy to be followed by it. First in importance among the problems he placed the suffrage question, saying:[464]

> We know that this convention has been called together by the people of this State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degrated our politics.

Next in importance among the problems facing the convention were those which concerned the judiciary according to President Kruttschnitt, who said:[465]

> I think that question is one that more deeply affects our country friends than it does those of us who live in the parish of Orleans, and in saying this I do not mean to be understood as saying that the judiciary system as it exists in the City of New Orleans re-

---

[460] *Act 58 of 1896.*

[461] *Official Journal of the Constitutional Convention of the State of Louisiana* (New Orleans—1898), pp. 3-8.

[462] Messrs. F. A. Monroe, Oliver O. Provosty and John St. Paul, all of whom later served upon the Supreme Court of the state; T. J. Semmes, termed by a contemporary as "Louisiana's greatest lawyer" and who had served in the Secessional Convention of 1861, the Convention of 1879 and who was appointed chairman of the judiciary committee for the Convention of 1898; C. C. Bird, a distinguished member of the bar from the Parish of East Baton Rouge; Robert Ewing, publicist; W. O. Hart, a brilliant lawyer and historian; J. Y. Sanders, later governor and long a political power; Martin Behrman, for years Mayor of New Orleans; Joseph E. Ransdell, later United States Senator from Louisiana; Riley J. Wilson, later Congressman from the state; and George K. Favrot, one of the youngest of the delegates, later Congressman and at present a district judge for the 19th Judicial District Court.

[463] *Ibid.*, p. 8.

[464] *Ibid.*, p. 9.

[465] *Ibid.*, p. 10.

quires no change whatsoever, but that the chief demand for a change comes from the country.

A judiciary committee of twenty-five members was appointed by the president on Friday, February 11.[466] Unfortunately for the student interested in the work of this convention, the amendments or ordinances offered on the floor of the convention or the reports submitted by the committee were not printed in the journal nor are they contained in the archives of the state. The *titles* of the ordinances offered show a wide range of subjects relating to the judiciary and bespeak an intense interest in that phase of the government.

A recommended judiciary title was reported by the committee on Saturday, April 23, as Ordinance Number 365.[467] That report was made the "special order of the day" for Wednesday, April 27, and for each day thereafter until its final passage, which occurred on May 7.[468] From the standpoint of this study the discussions in the convention as to courts of appeal form the most interesting part of its work. The exact recommendations of the committee are not accessible, as has been shown, but the provisions regarding appellate courts proposed by it were clearly very different in theory and organization from those adopted.[469]

When the portion of the committee report relating to courts of appeal first came before the convention, Mr. Phanor Breazeale moved to strike out all recommended articles pertaining to such courts, except as affecting Orleans parish.[470] A substitute system of appellate courts was proposed by J. B. Snyder of Tensas parish. This substitute provided that there should be one court of appeals for every two judicial districts, each to have two justices and to sit at least twice a year in each parish of their respective districts. District court judges would have served as court of appeal judges for districts other than their own.[471] Breazeale's

[466] *Ibid.*, p. 18; composed of T. J. Semmes, Chairman, F. A. Monroe, C. J. Boatner, W. O. Hart, Geo. W. Flynn, Henry Chrapolla, Wm. H. Wise, T. Alexander, Fred G. Hudson, F. P. Stubbs, P. Breazeale, W. P. Hall, T. J. Kernan, Jos. E. Ransdell, A. V. Coco, L. P. Caillouet, J. M. Thompson, James E. Mouton, A. P. Pujo, R. N. Sims, L. K. Watkins, J. L. Dogg and A. C. Allen. *Idem.*

[467] *Ibid.*, p. 270.

[468] *Ibid.*, pp. 354 and 355.

[469] Arts. 17 through 26 of this Ordinance No. 365. *Ibid.*, p. 296.

[470] *Journal*, p. 296.

[471] *Ibid.*, pp. 297 and 298.

amendment was defeated, and the proposal by Snyder was also defeated, 72 to 38.[472]

Four courts of appeal were proposed by committee amendment through Semmes, its chairman, each to have only two judges except that of Orleans which would have three. Provision was made by Mr. Semmes for incumbent court of appeal judges to be "carried over" for a certain period, after which the judges for these four courts would have been elected.[473] J. A. Snider, of Bossier parish, sought to limit Orleans also to a court of only two judges.[474] St. Paul sought to make the judges *appointive*.[475] However, the plan by Semmes was adopted.[476]

Despite this fact the convention reconsidered its action, on Wednesday, May 4, by a vote of 54 to 52.[477] There had evidently been much criticism of the expense which separate judges for intermediate appellate courts would entail.[478] *Snyder* amended his original proposal slightly and, sponsored by Breazeale, it was adopted as thus amended. This, it will be remembered, provided for the utilization of the district court judges for service on the courts of appeal.[479] This vexing problem was not yet solved for the convention later again reconsidered its action and, although retaining the principal of Snyder's proposal, adopted a substitute offered by Mr. Hart.[480] This substitute created *four* circuits; each of the four courts of appeal would, after a certain period, be presided over by two district court judges *as designated by the Supreme Court,* subject to the prohibition that no district judge could be designated to serve on the court of appeals for his judicial district.[481]

One of the judicial reforms most agitated in the convention was the elimination of much of the tremendous expense attached to trials, particularly to criminal trials in the country parishes. In his inaugural address, President Kruttschnitt had told the delegates that he hoped they would

---

[472] *Ibid.*, p. 299.
[473] *Ibid.*, pp. 303 and 304.
[474] *Ibid.*, p. 304.
[475] *Idem.*
[476] *Ibid.*, p. 304.
[477] *Ibid.*, p. 327. Messrs. C. A. Presley, Riley J. Wilson, R. L. Draughton and C. H. Tebault entered in the journal an explanation of their vote to reconsider, saying that the elimination of separate appellate judges would save the state from $20,000.00 to $25,000.00 annually, and that their constituents wished this done. *Idem.*
[478] *Ibid.*, pp. 327 and 332.
[479] *Ibid.*, pp. 327, 328 and 331.
[480] *Ibid.*, p. 344. Arts. 99, 100, 102 and 131, are as offered by Hart.
[481] *Idem.*

be able to "relieve the parishes of the enormous burden of cost in criminal trials." It should be remembered that the Constitution of 1879 had empowered the legislature to provide for trial by a jury less than twelve in number, in cases not capital nor necessarily punishable at hard labor.[482] This meager opening wedge was seized by this Convention of 1898 for the inauguration in the constitution itself of a drastic departure from custom.[483] It was provided that all cases necessarily not punishable at hard labor were to be tried by the judge alone; those in which the punishment might be hard labor by a jury of five, all of whom must concur for a verdict; cases necessarily punishable by imprisonment at hard labor by a jury of twelve, with nine necessary for conviction;[484] and capital cases by a jury of twelve, with concurrence of all necessary for a verdict.

These above provisions were inserted only after a bitter fight in the convention. Numerous alternative suggestions were made. Boatner would not have allowed *any* criminal case to be tried by a judge alone, and in only a limited class of cases would have permitted a jury of only five.[485] His proposal failed by a vote of 47 to 54.[486] Sanders sought to leave the size of criminal juries entirely to the legislature.[487] Snider, of Bossier, proposed that the cases to be tried by a judge alone be limited to those for which the punishment could not exceed a fine of $100.00 or an imprisonment of three months.[488] Stringfellow proposed that a unanimous verdict be required in *all* of the cases to be tried before a jury of twelve.[489] The novel proposal that jury service be inflicted as a penalty, on those qualified to vote but who failed to register, was made by Tebault. All these offered amendments were refused by the convention.[490]

It will be noted that the Constitution of 1898 contained much detailed and lengthly provision as to the judiciary for Orleans parish and for the city of New Orleans.[491] Certain

[482] Art. 7, Thorpe, *op. cit.*, p. 1472.
[483] Art. 116, *Constitution of 1898.*
[484] And in such a case the jury can not be waived so as to have the trial by the judge alone, although a plea of guilty may, of course, be made in cases less than capital. *State vs. Thompson*, 104 Louisiana 167; *State vs. Jackson*, 106 Louisiana 189.
[485] *Journal*, p. 818; under this proposal a jury of five could have tried only those cases necessarily not punishable at hard labor or those punishable by not more than two years at hard labor. *Idem.*
[486] *Ibid.*, p. 814.
[487] *Ibid.*, p. 815.
[488] *Ibid.*, p. 814.
[489] *Ibid.*, p. 814; defeated by vote of 38 to 47.
[490] *Ibid.*, pp. 813-815.
[491] *Arts.* 130 through 158.

changes were made on the floor of the convention from the recommendations of the committee. In contrast to the provisions of the Constitution of 1879 this succeeding constitution created *two criminal city courts,* inferior to the Criminal District Court of Orleans.[492] As recommended by the committee this district court would have had exclusive original criminal jurisdiction over all cases in which the punishment could exceed six months imprisonment without hard labor, or a fine of $100.00 or more. Criminal cases of less gravity would have been tried in the criminal city courts.[493] The convention increased the jurisdiction of the criminal city courts by fixing the jurisdictional amount of the fine at $300.00 instead of $100.00, and this, of course, resulted in a decrease in the jurisdiction of the Criminal District Court to that extent.[494]

The mass of legislative detail in the judiciary provisions pertaining to inferior civil courts in Orleans was the target of an amendment offered by Mr. T. W. Castleman, who would have struck out Articles 143 through 147, referring to the civil city courts of New Orleans, and in lieu thereof inserted articles authorizing the legislature to establish inferior courts for the city.[495]

It is to be noted that the Constitution of 1898 enlarged the jurisdiction of the justices of the peace for the country parishes by expressly providing that such justices were to have jurisdiction over suits for the ownership or possession of movable property and of suits by landlords for eviction, although such cases must come under the monetary limitation upon these justices of the peace.[496] This extension or classification was incorporated under an amendment offered by Chairman Semmes to the committee report.[497] The provisions as to jurisdictional amount were the same as embodied in the Constitution of 1879.[498]

Interesting innovations as to sheriffs were proposed by Messrs. Draughton and J. E. Moore. These gentlemen wished to sever the sheriff of the country parishes from his *ex officio* duties as tax collector, in those parishes having an

---

[492] *Cf.* Arts. 130 and 136, *Constitution of 1879,* Thorpe, *op. cit.,* pp. 1494 and 1495, with Arts. 139 and 140, *Constitution of 1898.*
[493] *Journal,* pp. 821 and 822, Art. 59 of the Ordinance No. 365.
[494] *Ibid.,* pp. 821 and 822.
[495] *Ibid.,* p. 828.
[496] Art. 126.
[497] *Journal,* pp. 818 and 819.
[498] *Cf.* Art. 125, *Constitution of 1879,* Thorpe, *op. cit.,* pp. 1492 and 1493.

assessment exceeding $1,000,000.[499] These attempts were defeated and, as adopted, the provisions concerning the duties of these sheriffs were as provided in the Constitution of 1879.[500]

Certain other proposed changes from the committee report were made which, although not adopted, received consideration. Phillip S. Pugh sought to extend the criminal appellate jurisdiction of the Supreme Court to questions of *fact* as well of law.[501] An attempt by St. Paul to compel *all* courts to assign specific written reasons for decisions, and depriving them of the discretion of assigning reasons in general terms, was defeated.[502] A population of 30,000 would have been required for a judicial district had the proposed amendment by Dawkins been adopted.[503]

Thus did the convention proceed until a completed judicial title was finally adopted on May 7, by a vote of 72 to 27.[504] The explanations by certain of the delegates voting against adoption of the constitution are of interest. Sanders, Ewing and Behrman explained their negative votes as being in protest of what they termed an abrogation of the right of jury trial;[505] Charles T. Soniat, as a protest against the incorporation of so much legislative matter and because the tax-collector for Orleans was made appointive.[506] St. Paul likewise disparaged the inclusion of legislative matter and further said:[507]

> I must protest against these eternal efforts to withdraw all powers from the legislature (something the people have not asked us to do) and on the other hand strengthening the hands of the executive department, which is the very thing the people do not want us to do.

Aside from the changes already noted in the judicial structure, when compared with the judiciary established under the Constitution of 1879, certain others should be commented upon. A new method for the selection of a chief

---

[499] *Journal*, p. 815.
[500] *Cf.* Art. 118, *Constitution of 1879*, Thorpe, *op. cit.*, p. 1491, with Art. 119, *Constitution of 1898*.
[501] *Journal*, p. 293.
[502] *Ibid.*, p. 294.
[503] *Ibid.*, p. 307.
[504] *Ibid.*, pp. 354 and 355.
[505] *Ibid.*, p. 355.
[506] *Idem.*
[507] *Idem.*

justice of the Supreme Court was provided by Article 87; that is, when this office next became vacant, the successor would be that justice who had served the longest. The civil jurisdiction of the Supreme Court was materially broadened so as to include all *incidental* demands arising *in connection with* suits for separation from bed and board and for divorce, as well as those involving alimony; and to cases of emancipation, adoption, legitimacy, custody of children and interdiction.[508] As to municipal corporations, not only was the jurisdiction of the Supreme Court retained over cases in which the *legality* of penalties imposed by such corporations was attacked but provision was also made for the court to have jurisdiction over cases in which a municipal ordinance had been declared unconstitutional.[509] The Supreme Court was also vested, for the first time, with such jurisdiction over cases in which a *legislative* act had been declared unconstitutional.[510]

The court held that it was limited in such appeals involving the *unconstitutionality* of an ordinance or act to that question alone and other issues would have to be corrected elsewhere;[511] and the direct appeal to the Supreme Court on the constitutional question would not cut the parties off from such other appeal.[512] The constitutional issue would confer jurisdiction in criminal cases regardless of the nature of the crime, whether a felony or a misdemeanor.[513]

The *criminal* appellate jurisdiction of the Supreme Court was enlarged so as to extend to all cases in which an imprisonment of six months had been imposed, even though not at hard labor.[514] Delays and expenses of remanding cases could be avoided through the additional power granted in the Constitution of 1898 to the Supreme Court of deciding itself any question of fact affecting its jurisdiction in a pending

---

[508] *Cf.* Art. 81, *Constitution of 1879*, Thorpe, *op. cit.*, pp. 1483 and 1484, with Art. 85, *Constitution of 1898*.

[509] Art. 85. Hence, when "ordinances which have not imposed a fine, wherein the legality and constitutionality of the particular ordinance has been contested". . . . have been declared unconstitutional, an appeal will lie direct to the Supreme Court. *Mayor et al. vs. Brown*, 117 Louisiana, (1906) 425.

For résumé of decisions involving municipal ordinances, and appeals therefrom, see *Town of Minden vs. Crichton*, 118 Louisiana (1907) 747.

[510] Art. 85.

[511] *Louisiana Society vs. Moody*, 52 La. Ann. 1815.

[512] *State vs. Tolman*, 106 Louisiana 662.

[513] *State vs. Goff*, 106 Louisiana (1901) 270.

[514] Art. 85. A jail sentence to be imposed in default of payment of a fine is not a sentence "actually imposed." *State vs. Peralta*, 115 Louisiana (1905) 529. Although costs follow sentence "they are no part of the 'fine actually imposed.'" *State vs. Price*, 124 Louisiana (1909) 917.

case, rather than being forced to send the case back to the lower court for trial on that question of fact.[515]

Power to make rules for, and decide on, disbarment cases was vested in the Supreme Court for the first time.[516] The necessity of two appeals in certain cases involving reconventional demands was eliminated by the provision in the Constitution of 1898 that such appeals should always follow the jurisdiction of the main demand, irrespective of the amount involved in the reconventional demand.[517]

The original jurisdiction of the district courts was changed by a few important additions thereto over that which had been provided by the Constitution of 1879.[518] Where title to real estate or to office, or any civil or political right, was contested, the district courts were vested with original trial jurisdiction irrespective of amount; over all cases in which a succession, the state, a parish or other political corporation was a party defendant; and over all proceedings for the appointment of receivers or liquidators to corporations or to partnerships.[519] These district courts were given appellate jurisdiction over justices of the peace courts "in all civil matters, regardless of the amount in dispute,"[520] instead of only over cases involving in excess of $10.00.[521]

Certain decisions, interpreting the articles defining the jurisdiction of the district courts, should be commented upon here. It was held that these courts were not vested under these articles with jurisdiction over *party nomination contests,* as title to a political office does not embrace a contest over nominations *within a party.*[522] The contest over the result of a "local option" election was held to be a "public right" and not such a "civil or political right" as to bring it under the jurisdiction of the district courts.[523] However, illegal assessments and taxation were said to be a violation

---

[515] Art. 85. *Dennenmann & Charleton vs. Charleton,* 113 Louisiana (1903), 278; *Riney vs. Hemenway Furniture Co.,* 119 Louisiana (1907) 329.

[516] Art. 85. Non-professional misconduct could not serve as a basis for disbarment. *State vs. Fouchy,* 106 Louisiana (1901) 743. However a contrary rule was provided under the *Constitution of 1921,* Art. VII, Sec. 10, as interpreted in *State vs. Flynn, 160 Louisiana 485.*

[517] Art. 95, *Constitution of 1898.*

[518] *Cf.* Arts. 109 and 111, *Constitution of 1879,* Thorpe, *op cit.,* p. 1490, with Arts. 109 and 111, *Constitution of 1898.*

[519] Arts. 109 and 111, *Constitution of 1898.*

[520] Art. 111, *Constitution of 1898.*

[521] Art. 111, *Constitution of 1879,* Thorpe, *op. cit.,* p. 1490.

[522] *State ex rel Burke vs. Judge,* 111 Louisiana 939; *Roussel vs. Dornier,* 129 Louisiana 930.

[523] *Hagens et als. vs. Police Jury,* 121 Louisiana 684.

of "civil rights" and to come under the jurisdiction of the district courts irrespective of amount.[524]

A prosecution by a police jury, authorized by a legislative act, for a violation of a police jury ordinance was a "criminal case" within the meaning of Article 109 conferring original jurisdiction upon the district courts in all criminal cases.[525] It is to be noted that the constitution specifically named justice of the peace courts and mayors and recorders courts, and provided a right of appeal from these.[526] The Supreme Court said that, even though Article 96 authorizes the legislature to abolish justice of the peace courts and create city courts in their stead, city courts differ from, and are not included by reference to, either justice of the peace or mayors and recorders courts;[527] and, hence, the court held that the legislature had *no* power to provide for appeals from such city courts to the district court.[528] However, the court soon reversed itself and held that the legislature did have this power, if not divesting such other court of constitutionally vested jurisdiction.[529]

Under this Constitution of 1898 "the question of the territorial jurisdiction of . . . " justices of the peace . . . "is left entirely, and that of the jurisdiction *ratione personnae* to some extent, to the General Assembly."[530]. Hence it was permissible for the legislature to confine the civil jurisdiction of these justices to their respective wards, and they could not compel a witness residing in another ward to appear before them.[531]

Some of the decisions must be read in connection with the articles of the constitution relative to the courts in Orleans parish. Although ordinarily an attack on a police regulation of the city of New Orleans, or on a city ordinance, would have to be first made in the recorders courts, with an appeal to the Supreme Court if failing there, and although the Civil District Court of Orleans was not vested with criminal jurisdiction, yet the Supreme Court held that "where property rights will be destroyed or greatly impaired, interference with

[524] *Bunkie Brick Wks. vs. Police Jury*, 133 Louisiana 1062.
[525] *State vs. Fagin*, 135 Louisiana 497.
[526] Article III, *Constitution of 1898*.
[527] *State vs. Judge of 1st District Court*, 113 Louisiana 654.
[528] *Idem*.
[529] *State vs. Meiles*, 117 Louisiana 655; *State vs. Winfield*, 127 Louisiana 755.
[530] *New York Press Co. vs. Salter*, 129 Louisiana 51, citing Art. 126 of the *Constitution* and Art. 1071 of the *Code of Practice*.
[531] *Idem*.

criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity;" and, hence, the Civil District Court could give injunctive relief in such a case.[532]

The Criminal District Court was said not to have jurisdiction to entertain or pass on an application for naturalization;[533] nor to perform the functions of a juvenile court.[534] However, a judgment of this court rendered in the exercise of its "supervisory jurisdiction" over the inferior city criminal courts in Orleans could not be appealed to the Supreme Court unless appealable in character under Act 85.[535]

Juvenile courts were provided, however, in 1908.[536] In Orleans, a separate one was created; appeals were to go direct to the Supreme Court but on questions of law only.[537] For the country parishes this same amendment provided that district judges would act as *ex officio* juvenile judges for their districts.[538] However, in 1910 these provisions were made inapplicable to parishes containing cities of less than 7000 population, unless the police jury of that parish expressly requested to come under the operation of the act.[539]

Numerous were the cases interpreting and extending the jurisdiction of the Supreme Court. The Supreme Court's expressions of what its "supervisory power" extended to are of interest.[540] It was said as a broad rule that the court would decide, under the exercise of this power, pure questions of fact in a criminal case when it appeared that a patently erroneous ruling or construction had been made and a defendant sentenced without the least facts to sustain the sentence.[541] However this must be reconciled with the statement that this power of supervision does not confer the right to examine or disturb a verdict by a jury in a criminal case as to facts found by that jury.[542]

The court repeatedly held that if an adequate right to an appeal existed, and if there had been no usurpation of power

[532] *New Orleans Baseball Co. vs. New Orleans*, 118 Louisiana 228.
[533] *State vs. Baker*, 51 La. Ann. 1248.
[534] *In Re Parker*, 118 Louisiana 471, holding *Act 82 of 1916* to be therefore unconstitutional.
[535] *State ex rel Sholars vs. Duggan*, 51 La. Ann. 1482.
[536] Amendment adopted Nov. 3, 1908, proposed by *Acts 83 and 245 of 1908*.
[537] *Idem*.
[538] *Idem*.
[539] Amendment adopted Nov. 8, 1910, proposed by *Acts 48 and 135 of 1910*.
[540] Supplementing pp. 66 and 67, *supra*. For a general resumé of decisions under both constitutions on this point, see *Bloomfield vs. Thompson*, 134 La. 928.
[541] *State ex rel Groffina vs. Finnegan*, 52 La. Ann. 694.
[542] *State vs. Scanlan*, 52 La. Ann. (1900) 2058.

by the trial court, *writs of certiorari* and *prohibition* were not proper remedies.[543] Yet if a new point of law has been raised, of sufficient importance in jurisprudence, the Supreme Court will avail itself of its supervisory powers and decide that question.[544] And in the exercise of the supervisory powers it is competent for the Supreme Court "to stay proceedings in the district court, under an order which is appealable, until the action of the court of appeals can be had, when the litigant applies for the appeal to the court of appeals, which the district court refuses to grant."[545] Even the writ of *mandamus* may be used by the Supreme Court to control the discretion of trial judges.[546] Yet "misapplication of law to any given state of facts is not *excess* of jurisdiction, but error," and not to be corrected by the Supreme Court under its supervisory power but, if at all, by the court to which an appeal lies.[547]

The expression in the articles defining the Supreme Court's jurisdiction over "civil and political" rights seemed confusing. Where such a right alone was involved and the monetary jurisdictional prerequisite was not satisfied, it was held that an appeal would not lie to the Supreme Court.[548] This court also said that the correct doctrine, from the cases appearing in the *6 Louisiana* on, "has been that the appellate jurisdiction of the Supreme Court in a suit between contestants for public office was and is based upon the salary or pecuniary perquisites attached to such office,"[549] although a few decisions have been rendered apparently in conflict with this doctrine.[550] And the *right to be employed,* asserted under a statute designed to give employment to resident labor in public works in preference to non-residents, does not come under the exceptional cases provided by this Article 85 permitting an appeal to the Supreme Court irrespective of monetary interest.[551]

The power of the Supreme Court to review courts of appeal by writs of certiorari has been commented upon.[552] This was said by our Supreme Court to have been copied from

[543] *State ex rel vs. Judge,* 118 Louisiana 1; *In Re Teriot,* 117 La. 582.
[544] *Brunner Mercantile Co. vs. Rodgin,* 180 Louisiana 358.
[545] *State ex rel Williams vs. Judges,* 51 La. Ann. (1898) 161.
[546] *State vs. Judge, Division B,* 52 La. Ann. (1900) 1275.
[547] *State ex rel Green vs. Porter, Judge,* 104 La. Ann. (1901) 538.
[548] *State ex rel Ryanes vs. Gleason,* 112 Louisiana (1904) 612.
[549] *State vs. Parson,* 120 Louisiana (1907) 268.
[550] *Idem.*
[551] *State ex rel Burke vs. Sewerage & Water Board,* 113 Louisiana 923.
[552] Article 101, *Constitution of 1898.*

"the act of Congress of March 3, 1891, authorizing the writ of certiorari to circuit courts of appeal."[553]

Under this power, however, the Supreme Court will only review a court of appeals "in special or extreme cases, whose peculiar circumstances as to the facts or the law governing the same justify, in the opinion of the court, a resort to it."[554] And hence a legislative act[555] which purported to give a party the privilege of taking any case from a court of appeals to the Supreme Court was unconstitutional.[556]

It is to be remembered that a court of appeals was empowered itself to *certify* questions to the Supreme Court for decision.[557] In doing this the court of appeals must stipulate the facts as being present upon which the question is based, it not being the right nor the duty of the Supreme Court to go into the facts upon certification to it of a question.[558] Should the Supreme Court later bring the whole case up, by granting *certiorari,* it will then go into the facts and the law, and a prior statement of facts by the court of appeals would not be binding.[559]

The question of what constitutes "taxes" within the meaning of the Supreme Court's jurisdiction was touched upon by that court soon after adoption of the new constitution. Without overruling *Fayssoux vs. Denis,* but distinguishing the present case from it, the court held that a broad meaning of the terms "taxes," "tolls" and "imposts" was indicated by the wording of the article.[560]

Other decisions are to be briefly noted. It was held that the various courts of appeal had the power under the constitution of issuing writs in aid of their appellate jurisdiction, and resort must first be made to such courts in cases appealable to them.[561] The legislature was held empowered to prescribe rules for the courts of appeal, different from those governing the Supreme Court.[562]

---

[553] *In Re McLain,* 50 La. Ann. (1898) 999; 26 *Stat.* 838, Sec. 6.
[554] *In Re Ingersoll,* 50 La. Ann. (1898) 748.
[555] *Act 191 of 1898,* Sec. 2.
[556] *Monroe Mercantile Co. vs. Elder,* 51 La. Ann. (1898) 1773.
[557] Art. 101, *Constitution of 1898.*
[558] *Le Seigneur et al vs. Bessan,* 52 La. Ann. (1899) 187.
[559] *Idem.* By rules of the Supreme Court application to the court of appeals for rehearing is first essential. *In Re Huddleston,* 100 La. 594.
[560] *City of Shreveport vs. Prescott,* 51 La. Ann. 1895. *Fayssoux vs. Denis, supra,* p. 67.
[561] *St. Tammany Lumber Co. vs. Stewart's Creditors,* 134 Louisiana 874.
[562] *Smith vs. Cumberland Telephone Co.,* 126 Louisiana 168.

Concluding with the Constitution of 1898 it may be said that this document broadened the jurisdiction of the Supreme Court, although the creation for the first time of intermediate courts of appeal relieved it of much of the burdensome matters involving small monetary sums. The power of the Supreme Court over inferior courts was enlarged and applied more vigorously by that court. The constitution also continued the insertion of legislative detail, particularly as pertaining to the Orleans judiciary, and continued the principle of rule making by the legislature for governing the courts in the administration of judicial business. And by an amendment in 1908 juvenile courts appeared.

The next period of Louisiana's constitutional history is most unique. With the exception of the "Civil War" Constitution of 1864, that of 1913 remained in existence the shortest time of any of Louisiana's constitutions. Only seven years elapsed until the present one was adopted, and, yet, in that interim the Constitution of 1913 had been riddled by the courts.

By executive proclamation of August 25, 1913, Governor Luther E. Hall called the legislature into special session, and, in the call, there was specified as the only subjects to be considered those affecting the bonded indebtedness of the state, the State Training Institute and the method of filling vacancies to the United States Senate.[563]

Pursuant to this proclamation, the legislature convened on Monday, September 8, 1913. However, it went beyond the specified subjects named in the proclamation, and provided for the submission to the people of the question as to whether or not a constitutional convention should be held, with full power to adopt, without submission to the people for ratification, a new constitution.[564] This call for a convention contained express limitations against the framing of any ordinance inconsistent with any existing constitutional provision, except as relating to a certain bonded indebtedness maturing January 1, 1914, or relating to the Sewerage and Water Board of the city of New Orleans; and likewise prohibiting any ordinance changing any existing law as relating to any public board or commission, state institution, the edu-

[563] *Official Journal of the Constitutional Convention of the State of Louisiana* (Baton Rouge—1913), p. 3.
[564] *Ibid.*, pp. 3, 4 and 5; *Act 1 of 1913, 2d Extra Session.*

cational system, a parochial or municipal corporation, the levee system of the state, and the term, duty or compensation of any existing public office.[565]

This act was approved by the Governor on September 12;[566] and by the voters at the election held Tuesday, October 28, with a vote of 23,410 to 1029.[567] At this same election delegates were selected.[568] The convention convened on November 10, 1913, to sit for just twelve days.[569] It numbered but eighty delegates, of whom only a few had served in prior conventions.[570] Newton C. Blanchard was unopposed for president. Only four ordinances pertaining to the judiciary were introduced, and all of those by W. O. Hart.[571]

After the adoption of the constitution framed by this convention the state was soon thrown into confusion as to its organic law. As has been shown, the legislative call for the convention extended beyond the subjects named in the executive proclamation, and the convention itself disregarded the limitations placed upon it by the legislative call. These factors were urged as rendering null and void any provision of the adopted constitution contrary to these limitations. The question was first passed upon in the case of *State vs. American Sugar Refining Co.*[572]

A brilliant array of counsel participated in the trial and argument of that case before the Louisiana Supreme Court. A decision was rendered, with only Justice O'Neil dissenting, that even if the subjects named in the executive proclamation could be considered as limitations and not merely special examples called to the legislature's attention for consideration, the legislature when once assembled was not to be limited to those subjects in a call by it for a constitutional convention, since such a limitation upon a special session is operative upon it only when acting in a legislative capacity; but, *however*:[573]

> Act No. 1 of the Extra Session of 1913 calling for a Convention, with full power and authority to frame and adopt, without submission to the people, a new con-

[565] *Journal*, pp. 4 and 5.
[566] *Ibid.*, p. 5.
[567] *Ibid.*, p. 6.
[568] *Ibid.*, pp. 6, 7 and 8.
[569] *Ibid.*, p. 8.
[570] *Ibid.*, p. 10.
[571] *Ibid.*, p. 11. Ordinances 10, 12, 15 and 17 were by Mr. W. O. Hart.
[572] 137 Louisiana 407, decided May 24, 1915.
[573] *Idem.*

stitution of the State, subject however to a number of restrictions in said act, having been adopted by the people constituted a mandate to the Convention of 1913.

This decision was affirmed in a number of cases.[574] The practical effect of these was that insofar as the limitations contained in the *legislative call* had been exceeded by the convention the result was invalid. Hence in the *Tremont* case the court held that Article 291 of the Constitution of 1898, as amended, permitting the legislature to levy certain road taxes after an election, although entirely omitted from the Constitution of 1913, remained in full force and effect inasmuch as such an omission was prohibited by the call.[575] In the *Wunderlich* case the court held that the convention had no power to change the jurisdiction of the courts.[576]

Very few changes pertaining to the judiciary, however, were attempted by the convention. Provisions were made for an elective Supreme Court, but this was in accordance with an amendment which had been adopted in 1904 to Articles 86 and 87 of the Constitution of 1898.[577] Provision was also made for the retirement of Supreme Court justices with compensation, but this was likewise in accordance with an amendment to the Constitution of 1898, adopted in 1910.[578] Five new parishes had been created out of other parishes during the interim between the two constitutions, and these were added to the Second and Third Supreme Court districts by that latter constitution.[579]

The Constitution of 1913 purported to do what was impracticable or impossible by requiring judges to refer to a particular law to justify every definitive judgment, the saving clause, "whenever practicable," having been omitted by vote of the convention of November 21.[580] In the light of

---

[574] *Foley vs. Democratic Parish Committee*, 188 Louisiana 220; *Haynes vs. Assessor*, 148 Louisiana 697; *Tremont Lumber Co. vs. Police Jury*, 144 Louisiana 678; *Sheridan vs. Police Jury*, 145 Louisiana 403; *Wunderlich vs. New Orleans Railway and Light Co.*, 145 Louisiana 21; *In Re Perez*, 186 Louisiana 878; and *State vs. Clark*, 146 Louisiana 421.

[575] *Tremont Lumber Co. vs. Police Jury, supra.*

[576] *Wunderlich vs. New Orleans Railway and Light Co., supra.*

[577] *Amendments to the Constitution of 1898* (Baton Rouge—1907), 10th Amendment, adopted November 8, 1904, p. 12.

[578] Amendment adopted November 8, 1910, to Art. 86, proposed by *Act 277 of 1910.*

[579] Art. 87, *Constitution of 1913.*
Allen parish, created by *Acts 79 of 1910, and 6 of 1912.*
Beauregard parish, created by *Acts 78 of 1910, and 8 of 1912.*
Evangeline parish, created by *Act 15 of 1910.*
Jefferson Davis parish, created by *Acts 77 of 1910, and 7 of 1912.*
LaSalle parish, created by *Act 177 of 1908.*

[580] *Journal*, p. 67; Art. 91, *Constitution of 1913.*

the decisions cited it is submitted that such a change was invalid.

An appeal on "other incidental demands," as well as upon a reconventional demand, was to lie to the court having jurisdiction of the main demand,[581] in accordance with an amendment which had been adopted in 1904.[582] The salary of the Attorney-General was increased from $3000.00 to $5000.00, and provision was made for assistant attorney-generals.[583] These latter changes were all made in accordance with amendments adopted in 1906 and 1910.[584]

A drastic change in the appellate court system was attempted by the Convention of 1913.[585] The jurisdiction of these intermediate appellate courts was re-stated and enlarged. No minimum monetary amount was named, and they were expressly given appellate jurisdiction over *all* cases of which the district courts had exclusive original jurisdiction and in which the Supreme Court had not been vested; the same *maximum,* of $2000.00, which was found in the Constitution of 1898 was retained.[586] The changes were held to be invalid for reasons previously commented upon.[587] Express provision had been made, however, by constitutional amendment that appeals to these courts were to be on both law and fact.[588]

The organization of these courts of appeal had also been materially changed by this amendment and the changes validly incorporated into the Constitution of 1913.[589] There was to be a separate court of appeals for each of two circuits and for the parish of Orleans. There were to be three judges for each court, elected for eight years and with fixed salaries.[590] This plan of organization replaced that under the Constitution of 1898 by which trial judges heard appeals arising from districts other than their own and receiving bare expenses for this additional work imposed.[591]

---

[581] *Cf.* Arts. 95, *Constitutions* of 1898 and of 1913.
[582] Amendment adopted Nov. 8, 1904, proposed by *Act 137 of 1904.*
[583] *Cf.* Arts. 97, *Constitutions* of 1898 and of 1913.
[584] Amendments adopted Nov. 6, 1906, and Nov. 8, 1910, proposed by *Acts 30 of 1906* and *136 of 1910.*
[585] *Cf.* Arts. 98, *Constitutions* of 1898 and of 1913.
[586] *Idem.*
[587] *Wunderlich vs. New Orleans Railway and Light Co., supra.*
[588] Amendment adopted Nov. 6, 1906, proposed by *Act 137 of 1906.*
[589] *Idem;* amending Arts. 98, 99, 100, 106 and 131, *Constitution of 1898;* and abrogating Art. 105 thereof.
[590] *Idem.*
[591] *Idem.*

The maximum number of judicial districts into which the state, Orleans excepted, could be divided was increased from twenty-nine, as provided in the Constitution of 1898, to thirty-two, and thirty such districts were enumerated in the constitution itself, instead of twenty-nine.[592] All these changes were in accordance with an amendment which had been adopted in 1910.[593] The district judges were all placed on equal salaries, contrary to the provisions of the Constitution of 1898 but in accordance with the same amendment.[594] Retirement of district judges with full pay, upon reaching the age of seventy-five and having served continuously for twenty-five years either on a district court or court of appeals, was provided for by constitutional amendment in 1918.[595]

Certain other changes as relating to district judges had been made by constitutional amendment prior to the Constitution of 1913 and had been incorporated in that document. Two additional districts were given two judges each, certain portions having only temporary applications were omitted and provision was made that only those vacancies having less than a year to run could be filled by executive appointment.[596] These various changes were in accordance with a constitutional amendment adopted in 1912.[597]

The Supreme Court ruled that, under Article 112 of the Constitution of 1898, the court had no power to designate another district judge to fill a vacancy in a district court if for cause other than disability.[598] It will be noted that the Constitution of 1913 expressly stated that "in cases of vacancy in the office of judge" the Supreme Court could appoint one from another district to discharge the duties of the absent judge during his disability "or until the vacancy is filled."[599] The quoted words, which were not found in the Constitution of 1898, had been added so as to supply this additional power of appointment, but the change was held to be invalid.[600] Insertion of qualifications required of lawyers before they could serve as judges *ad hoc* in recused cases was also made in this Constitution of 1913, and express stipu-

[592] *Cf.* Arts. 107 and 108, *Constitutions of 1898 and of 1913*, respectively.
[593] Amendment, adopted Nov. 8, 1910, proposed by *Act 311 of 1910.*
[594] *Idem.*
[595] Amendment to Art. 108, adopted Nov. 5, 1918, proposed by *Act 163 of 1918.*
[596] *Cf.* Arts. 109, *Constitutions of 1898 and of 1913.*
[597] Amendment, adopted Nov. 5, 1912, proposed by *Act 147 of 1912.*
[598] *In re Perez, supra.*
[599] Art. 112, *Constitution of 1913.*
[600] *In re Perez, supra.*

lation made that residence in the district was not essential.[601] It is submitted that these changes were likewise invalid.

A separate juvenile court for Orleans was provided by the Constitution of 1913, while in the other parishes the district judges were made *ex officio* juvenile judges. The jurisdiction of these courts, the procedure to be followed and the punishment to be inflicted were enumerated in detail.[602] All the provisions pertaining to juvenile courts were, however, in accordance with constitutional amendments which had been adopted in 1908 and in 1910,[603] and were hence validly incorporated.[604] The section declaring that only those parishes containing a town of over 7000 population were to be affected by the provisions, unless the police juries of the other parishes requested its application, was stricken out by constitutional amendment adopted in 1916.[605]

Certain changes were attempted by the Convention of 1913 as to sheriffs.[606] The district judges were empowered to fill temporarily vacancies in this office in those parishes having no coroner; in those parishes having a coroner that officer would temporarily serve as sheriff. In addition to this change, sheriffs were *expressly prohibited* from collecting *municipal* taxes; and to the list of exceptions authorizing special compensation was added the care and conveyance of "juveniles, lepers and other persons" to be committed to any state institution.[607] In view of the decisions discussed it is submitted that such changes were invalid.

Contrary to the provisions of the Constitution of 1898, that of 1913 provided that *only* those vacancies in the office of sheriff, clerk of court, district attorney and the judicial officers of Orleans having less than a year unexpired were to be filled by executive appointment.[608] These changes were in accordance with constitutional amendments adopted in 1904 and in 1912.[609]

An amendment adopted in 1916 provided that the legislature, in fixing fees and costs to be charged by sheriffs,

[601] Art. 112, *Constitution of 1913.*
[602] Art. 118, *ibid.*
[603] Amendments to Constitution of 1898, adopted Nov. 8, 1908, and Nov. 8, 1910, proposed by *Acts 83 and 245 of 1908*, and by *Acts 48 and 135 of 1910.*
[604] *State vs. Clark, supra.*
[605] Amendment adopted Nov. 6, 1916, proposed by *Act 13 of 1916.*
[606] *Cf.* Arts. 119 and 120, *Constitutions* of 1898 and of 1913.
[607] *Idem. Cf.* Sec. 65, Art. VII, *Constitution of 1921.*
[608] Arts. 119, 124, 125 and 127, *Constitution of 1913.*
[609] Amendments adopted Nov. 8, 1904, and Nov. 5, 1912, proposed by *Acts Nos. 138, 139 and 140 of 1904*, and *Act 180 of 1912.*

clerks, justices of the peace, constables and coroners could place these officers on a salary basis, to be paid out of such funds and with any excess to be distributed as the legislature might provide.[610]

Greater rule making power had been confided in the judges of the Civil District Court of Orleans by an amendment adopted in 1908, as to allotment and assignment of cases for trial,[611] and the Constitution of 1913 incorporated this change.[612] Provision in the latter document for the functioning of the two city criminal courts in New Orleans, in the event of recusation or absence of the judges of either, was in accordance with an amendment of 1904.[613] Salary increases in these latter courts were effected by an amendment adopted in 1918.[614]

Certain changes had been effected by an amendment of 1902 with respect to the extremely lengthy legislative provisions of the constitution pertaining to the judicial salary and expense fund of Orleans and to the matter of judicial warrants there.[615] The Convention of 1913 omitted much of this legislative detail,[616] but it is submitted that such change was of no effect. However, by an amendment adopted in 1916 control of the "judicial expense fund" for Orleans was vested in the Civil District Court of that parish, and, in connection with that grant further legislative detail was inserted in the organic law.[617]

The district attorney for Orleans was materially affected by an amendment adopted in 1918.[618] This amendment placed him strictly on a salary basis, $4000.00 to be paid by the state and $5400.00 by the city of New Orleans.[619] Three years prior practice of law were required as a qualification for that office.[620] In addition, the same amendment made changes as to the manner of selection and salaries of an assistant district attorney and clerical help.[621]

---

[610] Amendment to Art. 129, adopted Nov. 7, 1916, in *Acts of 1917, p. 37 of amendments*, proposed by *Act 252 of 1916*.
[611] *Cf.* Arts. 134, *Constitutions* of 1898 and of 1913.
Amendment to Art. 134, adopted Nov. 3, 1908, proposed by *Act 280 of 1908*.
[612] *Idem*.
[613] Amendment to Art. 140, adopted Nov. 6, 1904, proposed by *Act 44 of 1904*.
[614] Amendment to Art. 140, adopted Nov. 5, 1918, proposed by *Act 66 of 1918*.
[615] Amendment to Art. 156, adopted Nov., 1902, proposed by *Act 182 of 1902*.
[616] *Cf.* Arts. 154, *Constitutions* of 1898 and of 1913.
[617] Amendment to Art. 133, adopted Nov. 7, 1916, proposed by *Act 252 of 1916*.
[618] Amendment to Art. 148, adopted Nov. 7, 1916, proposed by *Act 84 of 1916*.
[619] *Idem*.
[620] *Idem*.
[621] *Idem*.

Still a further change affecting the judicial officers of Orleans was made under another amendment adopted in 1918.[622] The legislature was empowered to provide for an interchange of judicial officers for that parish and to provide for the appointment of judges *ad hoc* to fill temporary vacancies there.[623]

These, then, were the changes made in the judicial structure by constitutional amendments in the interim between the two constitutions, and by amendments adopted subsequent to the Constitution of 1913. Aside from such amendments it is submitted that no valid changes in the judiciary were made from the provisions of the Constitution of 1898 until that of 1921. Among the changes which *were* perfected, the provisions for election of judges of the Supreme Court and for the creation of separate intermediate courts of appeal may be said to be most important. Next in importance among such changes might be said to be the appearance of juvenile courts.

[622] Amendment adopted Nov. 5, 1918, to Art. 180, proposed by *Act 116 of 1918.*
[623] *Idem.*

PART V

THE PRESENT JUDICIAL STRUCTURE

The Constitution of 1921

The necessity of a new constitution to end the uncertainty and confusion in the organic law, caused by the successful attacks on the Constitution of 1913, became apparent. Then, too, the judiciary was sadly in need of reorganization as the growth of litigation had resulted in a badly congested docket for the Supreme Court.[624]

There had been much agitation, particularly among the members of the bar, for reorganization of the judiciary or for particular changes in the judicial structure. As early as 1910 a plan had been proposed to the Bar Association, for its approval, that appeals *of right* to the Supreme Court be abolished, save in exceptional cases such as those involving a constitutional question or affecting public bodies.[625] This proposal had not been approved by the association and it was never seriously raised until recently.[626]

Startling innovations had been submitted for the consideration of the Bar Association in 1915. A life tenure for higher judges was urged by S. MacLawrason. He would have had courts below the Supreme Court established by the legislature so as to promote "elasticity." He urged that the Supreme Court be limited to questions of *law* alone and that its monetary minimum be raised to $4000.00. Should the legislature, under his plan, establish courts of appeal, he would have had these review the *facts* in all cases appealable to the Supreme Court and then certify their findings to the Supreme Court; and he would have required unanimous concurrence in a court of appeals in order to overrule a trial court on questions of fact.[627]

Extensive changes in the criminal procedure was urged by St. Clair Adams in 1915, including a proposal for a criminal code.[628] A unique suggestion was made by Ernest T.

---

[624] *Report of the Louisiana State Bar Association for 1929*, Vol. 29, pp. 46 and 47. From 1918 to 1922 the net gain of the docket over the work of the court was 676 cases. *Idem.*

[625] *Ibid.*, p. 50.

[626] *Idem.*

[627] *Report of the Louisiana Bar Association for 1915*, Vol. 16, pp. 198-208.

[628] *Ibid.*, pp. 238-246.

Florence at the same meeting of the association. He submitted for consideration a plan calling for the appointment of all judges of courts of record by the Governor from a list of names submitted by the Supreme Court.[629] He also proposed that there be only one trial court, termed a General Court, with the judges thereof serving in such districts as assigned by the Supreme Court.[630]

And in 1919 the Bar Association was vigorously urging that a new constitutional convention be called. It seemed the concensus of opinion among the members participating in the meeting of that year that such a convention should be held at the earliest possible date. A resolution to that effect was quickly approved.[631] Discussion of the judiciary showed agreement on the need of reorganization, although conflicting proposals for the structure were made.[632] MacLawrason again urged omission of legislative detail.[633] Walter J. Burke advocated increasing the bench of the Supreme Court from five to seven and vesting it with a strong supervisory power over inferior courts, even as to assignment of judges for trial work. He also advocated complete abolition of the justice of the peace courts.[634] Commissioners, or Masters in Testimony, for determining *facts* would have been attached to the Supreme Court under the proposal of T. Jones Cross, of East Baton Rouge.[635]

Other suggestions for changes in the judiciary were also made. At the 1920 meeting of the association its president, Walter L. Gleason, advocated insertion in the new constitution about to be formed a provision that no act of the legislature could be declared unconstitutional if more than one judge of the Supreme Court dissented.[636] He was contemplating a bench of only five and with a bench of seven, as was provided by the new constitution, would no doubt have required concurrence of five in such action. His suggestion, which was in line with a general movement of some following, was not acted upon in the convention.

---

[629] *Ibid.*, pp. 247-256.
[630] *Idem.*
[631] *Report of the Louisiana Bar Association for 1919*, Vol. 20, pp. 106 and 107.
[632] *Ibid.*, pp. 21-64.
[633] *Ibid.*, p. 22.
[634] *Ibid.*, pp. 28-30.
[635] *Ibid.*, pp. 35 and 36.
[636] *Report of the Louisiana Bar Association for 1920*, Vol. 21, p. 206. Mr. Gleason is at present judge of Division D, Civil District Court, of Orleans parish.

Among those of the bar deploring the great length of the modern state constitution, and the mass of legislative detail therein, was W. O. Hart, of New Orleans. On the eve of the convention he said that "a great shortening of the Constitution can take place by limiting the provisions regarding the judiciary to one Article in the body of the Constitution and two in the Schedule . . . ," and he would have left such details as composition of lower courts, jurisdiction, terms and salaries to the legislature within certain safeguards against abuse.[637]

The Bar Association had appointed a committee for the purpose of investigating and recommending a proposed judiciary title for consideration by the convention. This plan, for which Walker B. Spencer of New Orleans was almost wholly responsible, encountered much opposition and criticism by the bar but was formally sponsored by the association.[638] The introduction of this plan in the convention itself and the reception there afforded it shall be commented upon later.

This plan, commonly termed the "Spencer Plan," was a drastic departure from the usual judicial provisions.[639] In substance, it vested judicial power in . . . "the Supreme Court, four Courts of Appeal, four District Courts," and such other courts . . . as were provided therein.[640] The Supreme Court was to have a chief justice and six associates.[641] Its monetary minimum was fixed at $5000.00, and suits for personal injuries, for death or for workman's compensation were not excepted from its jurisdiction; however, it was not expressly vested with appellate jurisdiction over

---

[637] *Louisiana Historical Quarterly*, Vol. 3, No. 4, pp. 577-578.
The one article which Hart would have had as a judiciary title in the body of the constitution read:

> 1. The judicial power of the State of Louisiana shall be vested in one Supreme Court, and in such inferior courts as the General Assembly may from time to time ordain and establish. There shall be an appeal in every case, civil and criminal, and the right of the Supreme Court to issue writs of review, and writs of certiorari, mandamus and prohibition in aid of their appellate jurisdiction, shall never be abridged or limited, but may be enlarged and extended by the General Assembly. No powers other than judicial shall ever be conferred upon the Justices or Judges of any court of greater dignity than City Court, Mayors' Courts or Justices of the Peace. *Idem.*

[638] *Ibid.*, pp. 5 and 6, 29-40, and 159.
This plan "was the result of serious work by a committee headed by Mr. Spencer and was propounded to the Association at the Opelousas meeting where it met the approval of the Association at that time." *Ibid.*, p. 159. It was presented at the 1920 meeting by Jos. W. Carroll in the absence of Mr. Spencer. *Ibid.*, pp. 29-40.
[639] *Journal of the American Judicature Society*, Vol. 5, No. 1, pp. 19-25.
[640] *Ibid.*, Art. 1, p. 20.
[641] *Ibid.*, Art. 16, p. 22.

matters of divorce or of homestead exemption, irrespective of amount, although it was vested with such jurisdiction over "trust estates" without regard to the amount involved.[642]

There were novel provisions as to criminal appeals. The Supreme Court was to have criminal appellate jurisdiction only in capital cases or in those in which a penitentiary sentence had actually been imposed.[643] As to appeals in cases of less gravity, the plan vested the courts of appeal with criminal appellate jurisdiction, provided that a fine of $100.00 or two months imprisonment had actually been imposed.[644]

Although the plan provided for only *four* district courts, there would have been thirty district judges. These were to have such general trial and appellate jurisdiction as the legislature might confer by general and uniform act.[645] There would have been parish courts in lieu of justices of the peace.[646]

The most interesting feature of the Spencer plan was the creation of *judicial councils.* There would have been a *Supreme Judicial Council,* composed of the chief justice of the Supreme Court, three associate justices appointed by him in rotation, and the presiding judges of the courts of appeal and of the district courts. This council of twelve was to have a wide power of rule making, assignment of judges, fixing costs of proceedings, and of upholding the standards of the bench and bar.[647] In addition there would have been a *District Judicial Council* for each of the four districts, each to be composed of the three appellate judges for that district, the presiding judge of the district court and one other district judge appointed in rotation by the presiding district judge.[648]

The provisions pertaining to the selection of judges and filling of vacancies were novel. Vacancies in the courts of appeal or district courts were to be filled by executive appointment from a list of from three to five, as designated by a majority of the Supreme Judicial Council, subject to confirmation by the Senate.[649] Vacancies in the Supreme Court

[642] *Ibid.*, Art. 18, pp. 22 and 23.
[643] *Idem.*
[644] *Ibid.*, Art. 21, p. 23.
[645] *Ibid.*, Art. 24, p. 24.
[646] *Ibid.*, Art. 26, p. 24.
[647] *Ibid.*, Art. 27, pp. 24 and 25.
[648] *Ibid.*, Art. 28, p. 25
[649] *Ibid.*, Art. 5, pp. 20 and 21.

would have been similarly filled from a list of five as designated by a majority of the remaining justices of that court. At intervals of twelve years the voters would decide on continuance of judges in office, and a majority of those voting for Governor would have been required to depose a judge.[650]

Numerous distinguished jurists and lawyers became interested in this Spencer Plan and strongly approved it.[651] Concerning the method of judicial selection there embodied, the *Journal of the American Judicature Society* had this to say:[652]

> It would seem difficult indeed to frame a plan for the selection of judges better calculated to afford wise selections and to permit equally responsible participation of the electorate in terminating the services of an unpopular judge.

From the many and varied proposals made on the eve of the convention of 1921 it may be said that interest in judicial problems was very keen and that the delegates had been studiously informed on the problems. The convention convened at Baton Rouge on March 1, 1921.[653] Among the one hundred forty-six delegates were many who had served in prior conventions, but an enumeration of the distinguished members would entail more time and space than this study will permit.[654]

The "Spencer Plan" was altered in certain important features before its introduction in the convention by Mr. Bell.[655] The chief change made may be said to have been the omission of the provisions relating to the selection of judges and filling of vacancies. The unique provisions relating to these features have been discussed and the comment thereon has been noted. Instead of such method, the plan

---

[650] *Idem.*

[651] Chief Justice W. H. Taft, Geo. W. Wickersham, Judge Alton B. Parker, Gurney E. Newlin, sometime president of the American Bar Association, and Mr. Crocker, sometime president of the California Bar Association and of the California Chamber of Commerce. *Letter from Walker B. Spencer* to the writer, New Orleans, September 14, 1931.

[652] *Journal of the American Judicature Society*, Vol. 5, *loc. cit.*, p. 20.

[653] *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* (1921), p. 8.

[654] Mr. Hewett Bouanchaud, of Pointe Coupee, was chosen president. *Ibid.*, p. 11. Among the delegates, Walter J. Burke and M. H. Carver had served in the conventions of 1898 and of 1913; Martin Behrman, Phanor Breazeale, L. P. Caillouet, J. Y. Sanders, Jefferson B. Snyder, Frank P. Stubbs, R. F. Walker and others had served in the convention of 1913. W. Carruth Jones, present district judge of East Baton Rouge, was a delegate.

[655] *Ibid.*, Ordinance No. 180, pp. 147-155.

was altered so as to provide for the election of these judges;[656] and, instead of the judges for all the courts above the parish courts being selected for terms of twelve years, it was provided that the judges for the courts of appeal should hold office for eight year terms[657] and those of the district courts for four year terms.[658]

The provision in the plan vesting a broad "rule making power" in the Supreme Judicial Council was omitted before its introduction.[659] The salaries proposed were slightly decreased from those originally in the plan.[660] The provisions as to parish courts were omitted, and instead justices of the peace were provided.[661] The discretion which Spencer would have permitted the legislature as to jurisdiction of the trial courts was greatly restricted before this actual introduction by Bell.[662]

In addition to the introduction of the Spencer Plan, as thus revised, various other ordinances relating to the judiciary were introduced. Under an ordinance introduced by Ponder the Supreme Court and courts of appeal would have been practically the same as under the Constitution of 1913.[663] This ordinance did, however, provide that the courts of appeal would make separate findings of law and fact; these findings of fact would be final, but those of law would be reviewable by the Supreme Court if more than $2000.00 was involved.[664] And the Supreme Court would have had *unlimited* criminal appellate jurisdiction, but of course on law only.[665]

A different plan was introduced by Ellender.[666] This provided for the Supreme Court to have civil appellate jurisdiction on questions of law only, in cases involving from $5000.00 to $10,000.00, but on law and facts if more than $10,000.00 was involved.[667] The courts of appeal would have been vested with civil appellate jurisdiction on both questions of law and fact in cases involving from $100.00 to $5000.00

[656] *Cf.* Arts. 5, 15, 19 and 22 of the ordinance with Arts. 5, 16, 20 and 28 of the "plan."
[657] *Cf.* Art. 19 of the ordinance with Art. 5 of the "plan."
[658] *Cf.* Art. 22 of the ordinance with Art. 5 of the "plan."
[659] *Journal of the American Judicature Society, loc. cit.*, pp. 19-25, Art. 11.
[660] *Cf.* Art. 8 of the ordinance and of the "plan."
[661] *Cf.* Art. 15 of the ordinance with Art. 16 of the "plan."
[662] *Cf.* Arts. 13 and 15 of the ordinance with Arts. 14 and 16 of the "plan."
[663] *Ibid.*, Ordinance No. 58, pp. 49-51.
[664] *Idem.*
[665] *Idem.*
[666] *Ibid.*, Ordinances Nos. 89 and 90, p. 64.
[667] *Idem.*

inclusive, and on those of law alone if more than $5000.00 but less than $10,000.00 was involved.[668] Criminal appellate jurisdiction below that vested in the Supreme Court would have been given these courts of appeal[669]

Another pertinent ordinance was that introduced by Phillip S. Pugh.[670] This fixed the minimum jurisdictional amount for the Supreme Court at $5000.00, excepting suits *ex delicti* and suits against a public carrier.[671] Under it the criminal appellate jurisdiction of this court would not have been limited to questions of law only, and an appeal would have been allowed in those cases in which the penalty *could be* death or imprisonment for twenty years or more at hard labor.[672] It would have increased the bench to seven, to be elective for fourteen years and to be divided into two sections for greater efficiency.[673] In addition, the ordinance contained a provision, entirely foreign to suggestions made in prior conventions, conferring upon the Supreme Court the duty of rendering "advisory opinions" when requested so to do by the legislative or executive departments.[674]

This ordinance would have vested the courts of appeal with ordinary civil appellate jurisdiction over cases involving less than $5000.00, over all tort claims or suits against a public carrier if involving in excess of $100.00, and over all compensation suits.[675] Should more than $2000.00 be involved any case appealed to the courts of appeal could be reviewed by the Supreme Court on questions of law alone.[676] These courts of appeal were also vested with criminal appellate jurisdiction over cases where not vested in the Supreme Court.[677]

A proposal for a Supreme Court was made by Snyder, similar as to size, method of selection and term of office to the plan by Pugh. However, it would have conferred upon that court a wide supervisory power over inferior courts, enabling it to require reports from, and make investigations of, the inferior courts.[678] There would have been only three

[668] *Idem.*
[669] *Idem.*
[670] *Ibid.*, Ordinance No. 212, pp. 184-188.
[671] *Idem.*
[672] *Idem.*
[673] *Idem.*
[674] *Idem.* Ordinance No. 37, by Bell, made a similar provision but was reported unfavorably by the judiciary committee. *Ibid.*, p. 16 of the calendar.
[675] *Ibid.*, Ordinance No. 212, pp. 184-188.
[676] *Idem.*
[677] *Idem.*
[678] *Ibid.*, Ordinance No. 333, pp. 290-298.

courts of appeal under the Snyder proposal, but each court would have had *five* judges.[679]. The Supreme Court could have reviewed the courts of appeal in all cases but only on questions of law.[680] The legislature would have been empowered to add to the jurisdiction of the Supreme Court at the expense of the courts of appeal and could also have created additional courts of appeal.[681]

There would have been thirty-three district judges under the Snyder plan, to be allotted to thirty fixed districts.[682] For the parishes outside Orleans these district courts would have had concurrent jurisdiction with the justices of the peace over cases involving in excess of $50.00 and not in excess of $100.00, and exclusive jurisdiction if in excess of this latter amount was involved.[683]

Another ordinance pertaining to the Supreme Court was introduced by Pecot.[684] With respect to the number of judges, method of selection, term and jurisdiction, this was similar to that by Snyder. However, it provided that the Supreme Court could assign or provide for the interchange of district judges; and it fixed the minimum jurisdictional amount for the courts of appeal at $2000.00.[685]

A novel plan for the selection of judges to the Supreme Court was proposed by Barksdale.[686] This provided for the selection of these judges by an *electoral college*.[687] The committee reported this ordinance unfavorably, and it was withdrawn from the calendar.[688] Byrnes attempted to limit the Supreme Court to questions of law only, both in civil and criminal cases.[689] The supervisory power of the court would have been greatly restricted by Provosty who sought to limit it strictly to the correction of "abuses of authority."[690]

Numerous proposals other than those which have been discussed were made in the convention relating to district courts. Sandoz proposed that a population of 25,000 be required for a judicial district and that for the parishes outside Orleans there be one judge for each such quota of popu-

[679] *Idem.*
[680] *Idem.*
[681] *Idem.*
[682] *Idem.*
[683] *Idem.*
[684] *Ibid.*, Ordinance No. 336, pp. 300-303.
[685] *Idem.*
[686] *Ibid.*, Ordinance No. 420, p. 374.
[687] *Idem.*
[688] *Ibid.*, p. 87 of the calendar.
[689] *Ibid.*, Ordinance No. 358, p. 331.
[690] *Ibid.*, Ordinance No. 275, p. 250.

lation in the district.[691] Criminal trials in district courts would have been changed under the proposal by Dawkins, for he suggested that the jury be judge of both law and fact as to guilt or innocence, with the trial judge permitted to discuss and analyze the facts when charging the jury as to law.[692] This ordinance was reported unfavorably by the committee and died on the calendar.[693]

Restriction of the civil trial jury to suits for personal injuries, or in slander, libel or expropriation suits, was the purport of an ordinance by Morrison.[694] He also proposed to eliminate the criminal trial jury of five and to have all those cases formerly triable by that jury triable by the judge alone.[695]

The delay in criminal trials occasioned when immaterial errors had been committed in the trial court was the target of a proposal by Stubbs to prohibit the setting aside of verdicts or the granting of new trials for immaterial errors.[696] The distrust of judicial determination of what constituted an "immaterial error" caused the committee to report this ordinance unfavorably, and it was withdrawn.[697]

An entirely new type of court was proposed for Orleans parish by Dowling, to be termed a court of domestic relations and to have exclusive jurisdiction of marital matters or for custody of children.[698] This was also reported unfavorably and withdrawn.[699]

Numerous ordinances were introduced relating to juvenile courts. As to organization thereof, the proposed ordinance by Heintz was similar to the former provisions.[700] Another, introduced by Williams, only pertained to a juvenile court for Orleans.[701] This did not prescribe the jurisdiction for the court but did provide that appeals from it should be on both questions of law and fact, to go first to the court of appeals for Orleans and tried there *de novo,* with an appeal

[691] *Ibid.*, Ordinance No. 71, p. 54.
[692] *Ibid.*, Ordinance No. 128, p. 137.
[693] *Ibid.*, p. 88 of the calendar.
[694] *Ibid.*, Ordinance No. 189, p. 156.
[695] *Idem.* Joffrion, however, proposed the retention of this jury of five. *Ibid.*, Ordinance No. 115, p. 94.
[696] *Ibid.*, Ordinance No. 206, p. 174.
[697] *Ibid.*, p. 48 of the calendar.
[698] *Ibid.*, Ordinance No. 377, pp. 334 and 335.
[699] *Ibid.*, p. 79 of the calendar.
[700] *Ibid.*, Ordinance No. 51, p. 49.
[701] *Ibid.*, Ordinance No. 102, p. 88.

permitted from that court to the Supreme Court but on a question of law only.[702]

There were many and varied provisions relating to the judiciary for Orleans. It was thus proposed that there be but one criminal court for Orleans above the grade of recorders courts.[703] However, another proposal was to retain one of the inferior city criminal courts and to provide the criminal district court with two judges, instead of three as under the other ordinance.[704] A city criminal court was also proposed by DeLucus, to have jurisdiction, for the trial without a jury, of cases in which the punishment could not exceed imprisonment for two years in the parish jail or a fine of $2000.00.[705]

The list of the ordinances introduced on the floor of the convention has not been exhausted, as only the most interesting and important have been commented upon. Mention has been made of those which were reported unfavorably by the judiciary committee. The remaining ones were reported out of the committee by substitute.[706] This substitute provided a complete judiciary title, and very few amendments were made thereto by the convention. This title incorporated certain recommended changes contained in the various proposals introduced. It may be said, however, that, aside from a re-grouping into a more compact judiciary title, this substitute made only a few drastic changes from the existing system.

The features of this new constitution, particularly the judicial provisions, are so well known and have been so carefully studied by all interested in the subject that a detailed comparison of the adopted judiciary title with those in former constitutions would no doubt be "carrying coals to Newcastle." But a few matters may be commented upon. The Supreme Court was increased from five to seven,[707] and the salaries for the judges of this court were increased, as was also their term of office.[708] In addition provisions were

[702] *Idem.*

[703] *Ibid.*, Ordinance No. 809, by Daly, pp. 274 and 275. This court would have had original jurisdiction over all criminal cases in Orleans and a wide supervisory and appellate jurisdiction over the recorders. *Idem.*

[704] *Ibid.*, Ordinance No. 264, by Williams, p. 228.

[705] *Ibid.*, Ordinance No. 167, pp. 133 and 134.

[706] *Ibid.*, Ordinance No. 486, by Overton, Chairman, pp. 748-763.

[707] *Cf.* Sec. 4, Art. VII, *Constitution of 1921*, with Arts. 86 and 89, *Constitution of 1913.*

[708] *Cf.* Sec. 6, Art. VII, *Constitution of 1921*, with Art. 86, *Constitution of 1913.* These salaries were further increased, to $10,000.00, in 1928. *Act 3 of 1928, Extra Session*, Legislature of Louisiana.

added for the first time empowering that court to sit in "divisions."[709]

Material changes were made in the jurisdiction and powers of the Supreme Court. Provisions appear for the first time vesting that court with original jurisdiction to remove judges.[710] The exception of suits for personal injuries, death or compensation from the provisions permitting an appeal of right if more than $2000.00 is involved was added.[711] To the special classes of matters in which appeals to the Supreme Court were expressly provided for "irrespective of amount," were added matters of "tutorship of minors, or curatorship of interdicts."[712] Yet appeals of right where "homestead exemptions" were involved, irrespective of amount, were somewhat limited.[713] The supervisory power of the court was greatly increased, particularly by investing it with the powers to assign district judges and to investigate inferior courts.[714]

Certain changes were made as to the districting of the state for district courts.[715] Greater limitation was placed upon the legislative power to change the number of district judges, as a two-thirds vote of the membership of each house, instead of merely a majority vote thereof, was made necessary to increase the number of district judges of any district; and the power to decrease the number by such a vote was added.[716]

Changes were made as to the jurisdiction and powers of these district courts. For the parishes outside Orleans the jurisdiction allotted to the justices of the peace was made concurrent with the district courts, instead of being exclusive if not more than $50.00 was involved;[717] and their appellate jurisdiction was somewhat extended.[718] There was added a provision compelling a district judge to give written findings of fact in a contested and appealable case when requested to

---

[709] Secs. 5 and 6, Art. VII, *Constitution of 1921.*

[710] *Cf.* Sec. 10 with Art. 85 of the *Constitution of 1913.*

[711] *Idem.*

[712] *Idem.*

[713] *Idem;* that if such exemption involved only movable property the monetary minimum would have to be met.

[714] *Cf.* Secs. 11, 12 and 80 with Art. 101, *Constitution of 1913.*

[715] *Cf.* Sec. 81 with Art. 107, *Constitution of 1913.* The number of districts was fixed at 25 instead of 30, and could only be changed by constitutional amendment. The number was increased to 26 in 1928. *Amendment adopted Nov. 2, 1926,* proposed by *Act 79 of 1926.*

[716] *Cf.* Sec. 81 with Art. 107, *Constitution of 1913.*

[717] *Cf.* Secs. 85 and 48 with Arts. 109 and 126, *Constitution of 1913.* Provision was added that the district courts would not be courts of record in these cases in which the jurisdiction was concurrent. *Idem.*

[718] *Ibid.,* Sec. 86, Art. VII.

do so.[719] And these judges were empowered to use certain writs in aid of their jurisdiction.[720]

The justices of the peace courts were further limited in power. A maximum number of these justices for any parish was inserted for the first time, as was a provision empowering the legislature to abolish the office entirely or reduce the number of justices in a particular locality.[721] As has been shown they were given no exclusive trial jurisdiction; and in criminal matters they were to be committing magistrates only, although express provision was added that they could require peace bonds.[722] The legislative authority to vest them with misdemeanor jurisdiction was omitted.[723] Provisions were added for the more extensive use of "city courts," those in the larger cities to possess a greater jurisdiction than previously existed.[724]

Structural changes were made as to juvenile courts. In parishes of over 25,000 in population the creation of separate and distinct juvenile courts was permitted.[725] In addition to the omission of capital crimes from their jurisdiction, assaults to commit rape were likewise excepted in the "country" parishes;[726] however, this latter exception was not made as to the Juvenile Court of Orleans.[727] Brevity was sought, and much legislative detail was omitted, as to such matters as definition of "neglected" and "delinquent" children, details of procedure, probation officers, punishment to be imposed, et cetera.[728] Specific provision was made that all appeals from juvenile courts for the parishes outside Orleans were to be on question of law alone and were to go directly to the Supreme Court;[729] however, appeals from the Juvenile Court of Orleans were to go to the Criminal District Court of that parish on both questions of law and fact, subject to a right of review by the Supreme Court under writ, instead

---

[719] *Cf.* Sec. 48 with Art. 117, *Constitution of 1913.*
[720] *Cf.* Sec. 2 with Art 115.
[721] *Cf.* Sec. 46 with Arts. 126 and 96.
[722] *Cf.* Sec. 48 with Arts. 126 and 96; and can be abolished in any particular ward even during tenure of their justices, and city courts created in their stead. *State vs. Gooch*, 164 Louisiana 186.
[723] *Cf.* Secs. 48 with Arts. 126 and 96.
[724] *Cf.* Sec. 51 with Art. 96.
[725] *Cf.* Secs. 52, 53, 54 and 96 with Art. 118, as amended in 1916, p. 87 *supra.* By *Act 30 of 1924* a separate juvenile court was created for Caddo parish.
[726] *Cf.* Secs. 52 and 96 with Art. 118, as amended.
[727] *Idem.*
[728] *Idem.*
[729] *Ibid.*, Sec. 52.

of these appeals going direct to the Supreme Court and on questions of law only.[730]

Further legislative detail was omitted from the provisions pertaining to the Orleans judiciary as to such matters as fees, bonds, procedure, clerks, and deputies.[731] The jurisdiction of the Civil District Court of Orleans in cases involving from $100.00 to $300.00, instead of being exclusive, was made concurrent with that of the city courts of that parish.[732]

Important changes were made as to the Criminal District Court. Provision was made for it to sit in section.[733] It was given five judges instead of only three.[734] Its original jurisdiction was restated so as to clearly cover all offenses committed in Orleans, save as otherwise vested.[735] Its appellate jurisdiction was increased as has been noted.

Numerous other changes, of no great significance from a structural standpoint, were made in the judiciary for Orleans, particularly as to civil city courts[736] and recorders.[737] A change was, however, made as to judicial elections there, evidently with the view of separating these elections in Orleans from political considerations as much as possible. Instead of these being held on the dates of parochial or municipal elections, the new constitution provided that they should only be held on dates of congressional ones.[738]

The outgrowth of the emancipation of women was evidenced by the insertion in the constitution of the provision that women should not be drawn for jury service unless having previously filed a declaration of desire to serve.[739]

Certain other changes should perhaps be noted. Salaries and tenure of office were in general increased.[740] The pro-

[730] *Cf.* Sec. 96 with Art. 118, as amended.

[731] *Cf.* Secs. 79, 81, 82, 85, 89, 92 and 96 with Arts. 131, 134 to 139 inclusive, 142, 144, 145, 147 and 118 as amended.

[732] *Cf.* Sec. 81 with Art. 133.

[733] *Cf.* Sec. 82 with Art. 133.

[734] *Idem.*

[735] *Cf.* Sec. 88 with Arts. 139 and 140.
The former inferior city criminal courts were not retained. *Idem.*

[736] *Cf.* Secs. 90, 91 and 92 with Arts. 143, 131 and 147.
By *amendment adopted Nov. 2, 1926*, and *Nov. 8, 1928*, proposed by *Acts 293 of 1916* and *197 of 1928*, certain changes were made as to the jurisdiction and powers of the city courts, such as again granting the judges the power to issue marriage licenses and granting them the power to issue certain writs in aid of their jurisdiction. These amendments also provided that the Supreme Court could assign or interchange the judges thereof; and the latter amendment increased salaries.

[737] *Cf.* Sec. 94 with Art. 141. This section itself fixed the qualifications, manner of selection and jurisdiction of recorders, instead of leaving these to legislative discretion.

[738] *Cf.* Sec. 97 with Art. 152.

[739] *Cf.* Sec. 41 with Art. 116; held constitutional in *State vs. Dreher*, 166 Louisiana 924.

[740] *Cf.* Secs. 6, 19, 83, 85, 76, 80 and 82 with Arts. 86, 99, 100, 108, 109, 131, 132 and 133. Still further increases were affected in 1928 by *Acts 2, 3, 11 and 16 of 1928, Extra Session.*

visions relating to retirement of judges were likewise rather materially altered.[741] Instead of the judges of the Supreme Court or of district courts being eligible for retirement at *full pay,* upon reaching seventy-five years of age, and after having served twenty-five years continuously on a court of record, it was provided that they would only be retired on two-thirds pay, but at seventy years of age and after having served only twenty years on a court of record; and the retirement provisions were made applicable to court of appeal judges also.[742]

Certain decisions of the Louisiana Supreme Court, in addition to those which have been mentioned in footnotes, are perhaps of interest with the present chapter. The judiciary system was established completely by the constitution, and the provisions establishing that system did not depend for efficacy and effect upon legislative will.[743]

There have been numerous cases interpreting the powers and jurisdiction of the Supreme Court. It was held that the supervisory jurisdiction of that court over "inferior courts" extends to contempt proceedings of the Louisiana Public Service Commission, but the Supreme Court carefully said that it was not declaring the commission a "court" or that others of the commission's orders would be subject to this supervisory power.[744] Where a court declines jurisdiction of a case in error of law, and not on any question of fact, the plaintiff in the case has the right to invoke the supervisory power of the higher court to compel a trial of the case.[745]

A nice distinction in jurisdiction was drawn when the court said that, although in a suit to recover damages for "physical pain and mental anguish" an appeal would lie to the court of appeals even if in excess of $2000.00 was involved,[746] yet, if there were no physical injuries but merely "mental anguish," the appeal would be governed by the

---

[741] *Cf.* Sec. 8 with Arts. 86, 99 and amendments adopted in 1918 to Art. 108, p. 86 *supra.*

[742] *Idem.* In *State vs. Cullen,* 168 Louisiana 976, it was held that, even if the judge had reached the age for compulsory retirement, he would still be a judge *de facto* if he continued to act, and in cases argued before the court which included him there could be no collateral attack on his judicial title; *State vs. Sanderson,* 169 Louisiana 55, to the same effect.

[743] *State vs. Flynn,* 160 Louisiana 488; which held therefore that Sec. 10, conferring original jurisdiction on the Supreme Court in disbarment cases, was self operating.

[744] *State ex rel Milling vs. La. Public Service Commission,* 154 Louisiana 752; dissent by Dawkins, Overton, St. Paul and Thompson.

[745] *Pullen vs. Pullen,* 161 Louisiana 724 (721).

[746] *Adams vs. N. O. T. & M. R. R.,* 164 Louisiana 1011.

amount involved.[747] The test of the Supreme Court's criminal appellate jurisdiction depends upon the punishment which *could be* imposed for the offense charged, as was the rule under the Constitution of 1852 and under all subsequent ones beginning with that of 1879 despite minor changes of phraseology.[748]

The court's jurisdiction in "tax" cases continued to result in certain confusion. The Supreme Court specifically reversed an earlier decision and held that it has jurisdiction, without regard to amount, in tax cases only when the legality of the *law itself* under which the tax was levied is involved, and not where the question is whether a legal tax law is applicable to a particular business or case.[749] The implication in this case, that *only* when the *constitutionality* of the *tax itself* was involved could a review be had by the Supreme Court irrespective of amount, was later corrected.[750] The court then attempted to fully state the correct principle, saying that where "the only matter in dispute is whether the individual defendant owes the amount, either in whole or in part, of the license which has been levied on the specified business, trade, profession or calling" and the constitutionality of the tax itself *or* its legality has not been disputed, the monetary minimum must be involved in order for the Supreme Court to have jurisdiction.[751]

The distinction between a "civil" and a "criminal" action is shown by a decision of the Supreme Court.[752] After holding that a denial by a court of original jurisdiction of a mandamus was a "final judgment," the Supreme Court then went on to say that an application for a parol was a "civil" action; and that when such application was not allowed by the Parole Board to be filed with it, claiming that the legislative act relied upon by the applicant was unconstitutional, an appeal would lie to the Supreme Court upon the refusal of the district court to mandamus the Board.[753] And it has

---

[747] *Spearman vs. Toye Bros. Auto & Taxicab Co.*, 164 Louisiana 677.
And there is no difference in the meaning of the term "matter" in dispute, used in prior constitutions, and the term "amount" in dispute as used in Sec. 10. *Michel vs. Michel*, 151 Louisiana 541.

[748] *State vs. Glenn*, 158 Louisiana 147.

[749] *State vs. Gallagher*, 158 Louisiana 532, overruling *State vs. Wenar*, 118 Louisiana 142.

[750] *Downs vs. Dunn*, 162 Louisiana 747, correcting *State vs. Gallagher, supra*, and *Hughes vs. Hicks Motor Co.*, 155 Louisiana 228.

[751] *Idem.*

[752] *State ex rel vs. Board of Parol*, 151 Louisiana 845.

[753] *Idem.*

also been said by the Supreme Court that, although "money or property actually held as evidence in a criminal case cannot be taken from the custody of such court without its consent and as long as said money or property is needed as evidence," yet when the criminal proceedings have terminated and a controversy arises as to the right to the money or property, "then a 'civil action' arises which is to be decided in a court having competent 'civil' jurisdiction." From the decision of this court an appeal will lie as in other civil cases.[754]

The authority to be given the decisions in those cases not appealable to the Supreme Court, upon its refusal to consider same under writ, was stated to be of greater weight than under former constitutions. "The refusal to issue a writ of review . . . under the Constitutions of 1898 and 1913 was not an affirmance of the judgment complained of but merely a declining to exercise the jurisdiction of the Supreme Court to review the case."[755] However "under the Constitution of 1921 . . . an appellate court is required to give its reason or reasons when it declines to exercise its supervisory jurisdiction . . . ," and, therefore, by its refusal to thus review, it may be said "that the Supreme Court affirms or at least approves the decision."[756]

The control which courts of appeal can exercise over inferior courts was restricted by the decision that limited the issuance of remedial writs to inferior courts only in aid of their appellate jurisdiction and denied them supervisory control over such inferior courts.[757] The district courts were similarly restricted.[758] And the jurisdiction conferred on district courts to appoint "receivers" was held not to apply to public corporations.[759]

A few other judicial expressions by the Louisiana Supreme Court under this Constitution of 1921 shall be noted at random. The entire question of "separation of powers" was considered by the court in reaching its decision that the employment of legislators by the highway department violated

---

[754] *Byrnes et al vs. Richardson*, 165 Louisiana 1025.
[755] *Carrere vs. The City of New Orleans*, 162 Louisiana 1015 (981).
[756] *Idem.*
[757] *Lavoy vs. Toye Bros. Auto & Taxicab Co.*, 159 Louisiana 209.
[758] *City of Gretna vs. Rossner*, 154 Louisiana 117; and, hence, as a district court has no appellate jurisdiction over contempt proceedings in a mayor's court it has no supervisory jurisdiction over such a proceeding.
[759] *Depew et al vs. Venice Drainage District*, 158 Louisiana 1099.

the constitutional provisions incorporating that principle.[760] An interesting decision from a political viewpoint was one which restricted the attorney general's office to cases involving those "interests" of the state as a distinct entity[761] and held that the Louisiana Highway Commission itself "is a distinct entity from the state," and can hence employ its own counsel.[762]

It must be remembered that the discussion of the changes which the Constitution of 1921 made in the judicial system is by no means exhaustive. It may safely be said in summation, however, that the most important judicial changes were those increasing the bench of the Supreme Court, permitting it to sit in sections and otherwise granting it flexibility in functioning as well as restricting appeals of right to it. But, at the same time, its supervisory powers were increased. The importance and power of the justices of the peace court were further decreased at the same time that those of city courts and district courts were increased. The juvenile court idea was further extended. The Criminal District Court of Orleans was enlarged and given greater jurisdiction with the abolition of inferior city criminal courts in New Orleans. Judicial salaries were in general increased, as was the tenure of judges of certain courts below the Supreme Court. Although much legislative detail was omitted, there remain lengthy provisions on matters which are left to legislative discretion in many states within safeguards.

---

[760] *Saint vs. Allen*, 169 Louisiana 1046.

[761] *Saint vs. Allen*, 172 Louisiana 850.

[762] *Idem.*

The interesting problem of separation of powers was also raised in a case involving clerks of court, but that feature of the case was passed over by the court, which rendered its decision on other issues. A legislative act had vested clerks of court with certain additional powers, including that of issuing executory process. (Act 204 of 1924). It was contended that such an act violated the provisions of the constitution as to separation of powers. (Secs. 1 and 2, Art. II). The court passed over consideration of whether this power conferred was a "judicial" one and justified its decision in upholding the statute by stating that executory process was not a "judgment" and by referring to earlier decisions upholding the vesting of clerks with power to homologate family meetings where not opposed. *McCoy vs. Hunter*, 167 Louisiana 1032.

In *State vs. Dowling*, 167 Louisiana 907, and in *State vs. Irion*, 169 Louisiana 481, it was held that when the constitution says recess appointments shall expire at "the end of the next session" and that the Governor's failure to send the name of such appointee to the Senate shall be equivalent to rejection, means "next regular or biennial session and not special session." It is submitted that this holding is clearly in conflict with the celebrated "Civil War" case of *Morgan vs. Kennard*, 25 Louisiana Annual 238, decided under the provisions of the Constitution of 1868, *supra*, p. 56.

PART VI

JUDICIAL REORGANIZATION

A system of law has been defined as "a body of general rules which produce like decisions in like cases, and are capable of being known with some degree of accuracy in advance."[763] Such a system of law implies the presence of accepted and definite norms of conduct and their application by impartial and competent judges. But merely defining an ideal system of administering justice may be of little value in securing a concrete expression of the desired goal. How can "impartial judges" be actually secured and, what is equally important, how can they be retained? Further, the formal criteria having been met, how is unnecessary delay in rendering decisions, or excessive cost necessary to obtain them, to be avoided? And how can fixed rules be prevented from stagnating social and economic progress? These questions immediately present themselves in an analysis of means for improving the system of judicial administration.

Since a "rule of law" must be applied by men, there has been as yet no judicial structure which has universally met with approval. The development of a judiciary is at best a slow and cumulative process, and the structure of the various judiciaries at the present time may be said to be undergoing themselves a "trial by battle" or "ordeal." Louisiana certainly stands as no exception today to the general rule.

> I have found during the course of discussion that nowhere is there any disagreement that our present judicial system is not performing the functions that the judiciary is expected to supply the people of the state—that it is falling down in many very vital parts. In some instances the system is so cumbersome that it does not dispense actual justice, in any event. In other instances, the delays are such as to work a practical denial of justice. In other instances, regardless of the delays, and in the final disposition of the cases, the incidental expenses of litigation are such

[763] John Dickinson, "A Working Theory of Sovereignty," *Political Science Quarterly*, Vol. 42, p. 525.

> that there is no practical workable system of justice so far as small cases are concerned.

This remark is by a Louisianian upon whom the state has bestowed its highest honors, Senator Huey P. Long, recently Governor.[764] It was not of some bygone judicial structure, but of the present one in Louisiana, that Senator Long was speaking, and after only seven years had elapsed from its formation.

A résumé of the reports of the State Bar Association for the years almost immediately following 1921 will show that Senator Long was correct in saying the Louisiana bar was in agreement on the *need* for changes. Unfortunately there are no judicial statistics which have been compiled showing the actual operation of the Louisiana courts. Hence we are somewhat in the dark as to the exact need, and, without a full appreciation of the need, any program for a remedy must be at best unsatisfactory.

The chief source of complaint in Louisiana seems to be with the appellate courts.[765] However, one compilation of judicial statistics indicates that the Supreme Court "has just about kept even with its docket. . . . " although ". . . it has not disposed of any of the congestion that had accumulated before."[766] Certainly it is evident that there is an inequality in the amount of work which comes before the three courts of appeal. The Second Court of Appeals and the Orleans Court of Appeals have been said to be flooded with work, while the First Court of Appeals has been said to have been much more fortunate in the size of its docket.[767] Such a situation may also be said to exist among the district courts and naturally so. It is only reasonable to expect that the amount of the judicial business is not dependent upon arbitrarily fixed territorial boundaries. The wisest and most impartial of men can not divide a state into divisions or districts having an equal amount of judicial business at any given time, and much less can such a division take due account of even the immediate future. It may be said, therefore, that elasticity is essential for the judicial structure of

[764] *Report of the Louisiana Bar Association for 1927-28*, Vol. 28, p. 80.
[765] *Ibid.*, pp. 80, 82, 78-94;
ibid., 1929, pp. 46-61 and 93;
ibid., 1930, pp. 43-49, 131-132;
ibid., 1931, pp. 23, 143.
[766] *Ibid.*, 1929, pp. 46 and 47.
[767] *Ibid.*, 1927-28, p. 80.

a modern state. The elasticity here mentioned relates to the structure itself.

In other matters vitally connected with an efficient judiciary there is also need for elasticity. In the matter of jurisdiction the necessity for this flexibility is evident. From the history of the Louisiana judiciary, covering only slightly more than a century, it may be seen how the jurisdiction of the Supreme Court has been steadily enlarged in its scope and yet restricted from a monetary standpoint. The present agitation for increasing the monetary minimum of that court, although only eleven years have elapsed since that minimum was fixed, demonstrates that point. In the matter of compensation, a review of the various Louisiana constitutions, and a consideration of the wholesale increases in judicial salaries made by the legislature in 1928,[768] illustrate a need for certain flexibility. Matters such as tenure, clerical assistance, temporary commissions or sections to clear congested dockets, all call for a desired flexibility. It is perfectly true, perhaps, that, under present conditions, some limitations must be placed upon this elasticity. The recognition of that essential should not, however, mean that a proper relationship between the two, flexibility on the one hand and limitations upon its expression on the other, can not be found.

There have been many points of judicial reform urged of recent years. To unify the courts, to restore the "rule making" power to the courts, to improve judicial selection and tenure, to incorporate the bar and raise the standards of that profession—all have been widely favored. These principles shall be considered in this discussion along with sundry others appearing pertinent. But the application of the problems to Louisiana is of secondary consideration, as the question of judicial reform is too broad to admit of such a narrow limitation. Nor is the matter of present expediency given prime importance. Rather shall suggestions be made with the thought of what is deemed better than at present. It is, of course, but following in the footsteps of others to advocate concurrence in broad principles of judicial reform,

[768] *Acts 8, 9, 11 and 16 of 1928, Extra Session.*

but some contribution may be made by considering what the experience of other states has been where certain of these points have been put into practice. It is at least to be hoped that profitable discussion will be stimulated.

JUDICIAL COUNCILS

What are termed judicial councils are in reality nothing more than coordinating bodies which have come to be recognized as effective machinery for the advancement and improvement of juridical science and the modernizing of justice. This movement is not a panacea. It has not yet reached its maximum development. "We have not yet centralized responsibility for the proper and efficient operation of the judicial system, much less have we vested in any central authority the power to effect the changes necessary to enable that system to meet the ever increasing demands made upon it."[769]

Only a brief résumé of the history of the judicial council movement shall be attempted here. Its origin, as is well known, was in England. Although bodies somewhat of the nature of such a council were created in Wisconsin, in 1913, and in New Jersey, in 1915, the movement in America gained substantial impetus with the report of the Massachusetts Judicature Commission in 1921, recommending a judicial council for Massachusetts.[770] Louisiana was presented with a proposal for such a council in 1921, when the "Spencer Plan," providing for a complete judicial system, formally approved by the Bar Association, was introduced in the constitutional convention of that year.[771] Among the many interesting features were the provisions creating one Supreme Judicial Council and four District Judicial Councils. The former would have been composed of the Chief Justice of the Supreme Court, three associate judges appointed by him, in rotation, and the presiding judges of the four courts of appeal and district courts which the plan would have created. This council would have possessed wide powers, including judicial rule making and assignment of judges. Each of the district councils would have been composed of the three

[769] *Third Report of the Judicial Council of California*, 1931, p. 82.
[770] Justice James W. McClendon, "A Review of the Judicial Council Movement," *The Texas Law Review*, Vol. 9, 1930-1931, pp. 366-374.
[771] *Journal of the American Bar Association*, Vol. V, No. 1, pp. 19-25; *Report of the Louisiana Bar Association for 1920, op. cit.*, pp. 5, 6, 29-40, and 159.

intermediate appellate judges for the particular district, the presiding district judge and one other district judge appointed by him in rotation. Massachusetts delayed and the Louisiana Constitutional Convention of 1921 did not see fit to adopt the "Spencer Plan," and, as a consequence, the opportunity for the leadership of this movement in the United States fell elsewhere.

Upon the recommendation of Chief Justice Taft of the United States Supreme Court, Congress created the Conference of Senior Circuit Judges on September 14, 1922.[772] This was the forerunner of the judicial council in America, and Ohio became the first state to create such a council in 1923. Through 1930, a total of twenty states had created judicial councils of one type or another.[773] Besides these, efforts are being made in some fourteen other states, including Louisiana, towards establishing similar councils.[774]

---

[772] McClendon, *loc. cit.*, pp. 866-874. For full text of this act, see *Journal of the American Judicature Society*, Vol. VI, No. 3, p. 69.

[773] (1) Ohio, in 1923. *General Code*, Secs. 1697-1 to 1697-5; 110 *Ohio Laws*, pp. 364 and 365; *First Report of the Judicial Council of Ohio, to the General Assembly of Ohio*, Convening January 5, 1931, p. 6.

(2) Oregon, in 1923. *General Laws of 1923*, ch. 149, amended and re-enacted by *General Laws of 1925*, ch. 164; *Oregon Law Review*, April, 1930, pp. 332-334.

(3) Massachusetts, in 1924. *Statutes of 1924*, ch. 244, amended by *Statutes of 1927*, ch. 293, and by *Statutes of 1930*, ch. 143; *Sixth Report of the Judicial Council of Massachusetts*, November, 1930, p. 6.

(4) Maryland, in 1924. McClendon, *loc. cit.*, pp. 866-874.

(5) Washington, in 1925. *Laws of 1925*, ch. 45; *Compiled Statutes Supplement*, 1927, Secs. 10959-10961; *Journal of the American Judicature Society*, Vol. IX, No. 4, p. 102.

(6) North Carolina, in 1925. *Public Laws of 1925*, ch. 244. Superseded in 1931 by a newly created council, termed the "Commission for the Improvement of the Laws." Letter from Henry London, Legislative Reference Librarian, to the writer, September, 1931.

(7) California in 1926. *Constitution of the State of California*, Art. VI, Sec. 1a.

(8) North Dakota, in 1927. *Laws of North Dakota, 1927*, ch. 124; *Journal of American Judicature Society*, Vol. X, No. 6, p. 171.

(9) Kansas, in 1927. *Laws of 1927*, ch. 187; *Report of the Judicial Council of Kansas*, 1927, pp. 5 and 6.

(10) Rhode Island, in 1927. *Laws of 1927*, ch. 1038; *Fourth Report of the Judicial Council of Rhode Island*, December, 1930, pp. 3 and 4.

(11) Connecticut in 1927. *Public Acts of 1927*, ch. 190; *Second Report of the Judicial Council of Connecticut*, December, 1930, p. 9.

(12) Virginia, in 1926, re-enacted in 1930. *Acts of 1930*, p. 788, ch. 355; *Journal of the American Judicature Society*, Vol. XV, No. 2, p. 53.

(13) Pennsylvania, in 1927 and 1928. *Journal of the American Judicature Society*, Vol. XIII, No. 3, pp. 77 and 78; *ibid.*, Vol. XIII, No. 2, p. 44.

(14) Kentucky, in 1928. *Acts of 1928*, ch. 20; *ibid.*, Vol. XII, No. 6, pp. 179-180.

(15) Wisconsin, in 1929. *Laws of 1929*, ch. 404; digested, *Journal of the American Judicature Society*, Vol. XIII, No. 3, pp. 71 and 72.

(16) Michigan, in 1929. *Public Acts of 1929*, No. 64; *First Report of the Judicial Council of Michigan*, January, 1931, p. 6.

(17) Illinois, in 1929. *Report of the Judicial Advisory Council of Illinois and the Judicial Advisory Council of Cook County*, January, 1931, pp. 5 and 6.

(18) Idaho, in 1929. Created by the incorporated bar under authorization of an amendment to the so-called Bar Act. *Idaho Session Laws of 1923, as amended in 1929*, Secs. 16-A and 16-B, ch. 211; *Idaho State Bar 1930 Report of the Judicial Council of Idaho*, pp. 5 and 6.

(19) Texas, in 1930. Digested, *Journal of the American Judicature Society*, Vol. XIII, No. 3, p. 77.

(20) New Jersey, in 1930. *Ibid.*, Vol. XIV, No. 3, p. 76.

[774] Delaware, Florida, Iowa, Missouri, Nebraska, New York, Oklahoma, South Dakota, Vermont, West Virginia, Wyoming and Minnesota. *Third Report of the Judicial Council of California* (1930), p. 82. In Louisiana the Bar Association is considering recommending such a council. *Post*, pp. 115 and 116. And Utah is to follow the lead of Idaho by creating a council through the action of its "incorporated bar." *Journal of American Judicature Society*, Vol. XV, No. 1, pp. 14 and 15.

These various councils differ greatly in details of organization and personnel, as well as in powers conferred upon them. It is not so much in the power conferred, however, that success lies, as in the personnel permitted to exercise these powers. It may be safely said that such a council "should be of wieldly size, that it may contain lawyer members as well as judges from both trial and appellate courts, and that it should be headed by the best man in the entire state, preferably a judge."[775] Like all other human institutions, its usefulness will depend upon personnel and leadership.

A leader in this movement has concisely stated the proper functions, as well as the possibilities, of a judicial council:[776]

> Combining the task of examining the conditions existing in our courts with the study of the causes which have given rise to those conditions which have led to widespread criticism of these tribunals—particularly the congestion and the delays therein—and involving, as it does, the responsibility of considering, devising and recommending the remedies for improving the administration of justice, the judicial council movement offers to the legal fraternity—to the Bench and Bar alike—the greatest opportunity for genuinely constructive public service.

Of the various judicial councils in America, only that in California has been established by express constitutional provision.[777] That of Idaho was created by resolution of the "incorporated bar" of that state, under legislative sanction.[778] In Pennsylvania a body of criminal judges, comparable to a judicial council, was called into conference by the Chief Justice of the Supreme Court, and by resolution of its convention was made a continuing body with organization features.[779]

In the remaining states the councils were created by legislative act.[780] Of these remaining states, the provisions per-

[775] *Journal of the American Judicature Society*, Vol. XII, No. 1, pp. 83-88. For the provisions of the judicial council proposed in the model judicial title framed by the American Judicature Society, see *ibid.*, Vol. XI, No. 4, pp. 113-115.

[776] Harry A. Hollzer, in the *Third Report of the Judicial Council of California*, *op. cit.*, p. 85.

[777] *Constitution of the State of California*, Art. VI, Sec. 1a.

[778] *Idaho Session Laws of 1923*, as amended in 1929, Secs. 16-A and 16-B, ch. 211.

[779] *Journal of the American Judicature Society*, Vol. XIII, No. 3, pp. 77 and 78; *ibid.*, No. 2, p. 44.

[780] *Supra*, p. 111.

taining to the Texas council are of particular significance. By dividing the membership into two classes, *ex officio* and appointive, and by making service of the *ex officio* members optional, the constitutional prohibition against conferring non-judicial duties on judges was believed met.[781] In Kentucky, the creation of such a council by legislative act was sustained.[782] This particular point was not even raised in that case, although the Texas court had by dicta said that even in the absence of constitutional prohibition non-judicial duties could not be imposed on judges. The Texas Judicial Council also differs from the others in that it is limited to the *civil* side of the judicial function.[783]

When the Louisiana Constitutional Convention of 1921 was presented with the proposals in the "Spencer Plan" for judicial councils it may be excused for doubting the feasibility of creating such a council because the plan was wholly untried in America. However, during the intervening ten years the system has been fully tested and may now be analyzed for results.

While it is not necessary to examine minutely the working of all the councils, it may be stated that all are required to make reports to the legislative or executive branches of the government. With the exception of North Dakota and Washington,[784] these reports have been printed, which present statistics, investigations and recommendations pertaining to the judiciary of the respective states. These investigations, of course, vary greatly in their scope. For example, the Michigan council has confined its attention to date primarily to "expropriation" proceedings in that state, claimed to be antiquated and in need of revision;[785] the Illinois council's recommendations have pertained primarily to improving the function of the criminal side of the judiciary;[786] and the Rhode Island council, as is not usually done

---

[781] *Journal of the American Judicature Society*, Vol. XIII, No. 3, p. 77. The "constitutional obstacle" was Sec. 3, Art. V, *Constitution of the State of Texas*, as raised in *In Re House Bill No. 537 of the 38th Legislature*, 118 Texas 367, 256 Southwestern 573, decided December 5, 1923.

[782] *Coleman, Auditor of Public Accounts, vs. Hurst*, 11 Southwestern (2d) 133, decided November 27, 1928.

[783] *Journal of the American Judicature Society*, Vol. XIII, No. 3, p. 77.

[784] In North Dakota, lack of appropriation has made, it "impossible . . . to print a report." Letter from E. J. Taylor, State Librarian of North Dakota, to the writer, September 1, 1931. In Washington, for similar reason "no report for 1930 was printed, and none will be printed for 1931. . " Letter from Mark H. Wright, Recording Secretary of the Washington Judicial Council, to the writer, Olympia, October 14, 1931.

[785] *First Report of the Judicial Council of Michigan*, 1931, pp. 7, 8, 17 and 24.

[786] *Report of the Judicial Advisory Council of Illinois*, *op. cit.*, pp. 9-23, 25-37.

by such bodies, has recommended changes in the *substantive* law of the state.[787]

An analysis of these printed reports would, it is believed, convince one of the feasibility of such a system for the improvement of the judicial branch of government. For example, in California "among the results of the judicial council in the (first) two years of its existence there may be mentioned: legislation to make contract provisions for arbitration specifically enforceable, following the lead of England, the Federal Government and New York; the very great reduction in Los Angeles county of the period between the date of setting a case for trial and its actual trial . . .; the creation of the needed additional trial judges in the superior courts of several counties and an 80% increase in the cases disposed of by the . . . intermediate courts . . .; and an increase of 25% in the output of the Supreme Court . . ."[788] In that state, also, the council studied the operation of the "Master Calendar" plan as used in certain courts of other jurisdiction.[789]

Under this system as used in the Cleveland court of common pleas and municipal court, there are separate clerks for civil and criminal cases, known as assignment commissioners and assisted by deputies who handle the assignment of their respective type of cases.[790] Civil cases, after an appearance has been made by the defendant, are placed in numerical order either on an "active list" or a "trial list," each of which may be divided into jury and non-jury cases. Suits then proceed orderly to trial, with the judges spared all preliminaries. Once a case is upon the trial list, it is not permitted to be re-assigned except for *bona fide* cause. The commissioner also dismisses cases in which service has not been obtained on the defendant within a fixed period, thus clearing "dead" cases from the dockets. When a defendant has failed to present a defense timely, after service, judgments "by default" are entered by the commissioner. The California council instituted a similar plan for the Los Angeles county Criminal Department of the Superior Court.[791] During the first two years thereunder an increase

[787] *Fourth Report of the Judicial Council of Rhode Island, op. cit.*, p. 16.
[788] Clarke B. Whittier, in *Journal of the American Judicature Society*, Vol. XII, No. 6, p. 174. *Cf. Second Report of the Judicial Council of California*, 1929, pp. 15-19.
[789] *Ibid.*, pp. 19-22.
[790] *The Second Report of the California Judicial Council*, 1929, pp. 33-37, 52-54.
[791] *Ibid.*, pp. 19-22.

of 154% in volume of contested criminal cases had been handled by an increase of only 50% in the number of judges, clerks and bailiffs, and the average cost of each trial had been reduced from $534.00 to $307.00.[792] In the light of this experience the council in 1928 established the "Master Calendar" plan for the superior courts of all counties having three or more judges.[793] And the continuous compilation of judicial statistics made by the council show that there has been a steady and continuing improvement in the status of all trial calendars since the creation of the council.[794]

The experience of California has not been unique. In Ohio the council has arranged with the Institute of Law of John Hopkins University for a three year study of judicial administration in the state.[795] Unification of courts and uniformity in legislation have been the key notes of the council's study there.[796] The executive and legislative departments in Massachusetts have utilized its council for research and opinion, and on its own initiative the council there has instituted researches into matters pertaining to the judiciary.[797] As a result of its "continuous study," the Massachusetts council has made recommendations relating to such problems as the elimination of congestion in the courts, separation of debt collection from contested litigation, simplification of procedure and the establishment of principles of commercial arbitration for certain classes of cases, discouragement of the use of civil juries, elimination of needless inquests, and the elimination of needless delays and technicalities both in civil and in criminal cases.[798]

It is submitted that a judicial council should be created in Louisiana. The provisions of the "Spencer Plan" for this purpose, and the attitude of the Bar Association at the time of its formulation, have been commented upon. Agitation has begun anew among members of the bar. The presidents of the association for 1929[799] and for 1930[800] recommended such

---

[792] *Idem.*
[793] *Idem.*
[794] *Ibid.*, pp. 22 and 23; and *Third Report of the Judicial Council of California*, 1930, p. 80.
[795] *First Report of the Judicial Council of Ohio to the General Assembly of Ohio, convening January 5, 1931*, p. 7.
[796] *Ibid.*, pp. 14 and 18.
[797] In particular, the report to the council by Robert G. Dodge on "Certain Features of the English Practice" is to be noted. *First Report of the Judicial Council of Massachusetts*, 1925, Appendix A, pp. 67-79.
[798] *Ibid.*, and subsequent reports, *passim*.
[799] R. F. White, *Report of the Louisiana State Bar Association for 1929*, Vol. 29, pp. 161-168.
[800] Charles F. Fletchinger, *ibid.*, 1930, pp. 187-188.

a council for Louisiana. And a special committee for the association, appointed to study the question, favored the creation of such a council and submitted a proposed act for that purpose.[801]

The numerical composition, if remaining of wieldly size, or the exact classification of members, seems immaterial to the writer so long as such membership includes both lawyers and judges, with the latter predominating. It is suggested that by all means provision should be made for a trained and well paid secretary for the council, although such a recommendation was not made in the above mentioned committee report. And it might be wise to empower the substitution of retired justices for active ones, similar to the provisions pertaining to the Massachusetts Judicial Council.[802] However, such a provision was neither contained in the "Spencer Plan" nor in the committee report.

A doubt has been expressed that a council containing judges thereon could be constitutionally created in Louisiana because of the prohibition against conferring non-judicial functions upon judges.[803] From considerations of a desire for permanence and authority, the advocates of a judicial council for Louisiana would no doubt prefer its constitutional creation, but it is submitted that such a council *could* be constitutionally created by legislative act, considering the Kentucky experience as precedent,[804] or at least that constitutional obstacles could be avoided by following the lead of Texas and making service upon the council by judges optional.[805]

JUDICIAL "RULE MAKING"

One of the notable features of the English judicial system in its civil aspects has been said to be the vesting of the "rule making" power in a mixed committee of judges and lawyers, with the former predominating.[806] Yet in America it has only been in the last few years that attention has been focused on the doubtful wisdom of allowing legislative

---

[801] *Ibid.*, pp. 72 and 73, 150-156. No new report was made in 1931. *Ibid.*, 1931, p. 144.
[802] *Cf.* Massachusetts *Statutes 1924*, ch. 244, as amended by *Statutes 1927*, ch. 298, and *Statutes 1930*, ch. 142.
[803] President Chas. F. Fletchinger, *Report of the Louisiana State Bar Association for 1930*, Vol. 30, p. 137.
[804] *Supra*, p. 113.
[805] *Supra*, pp. 112 and 113.
[806] McClendon, *loc. cit.*, pp. 866-874.

bodies to continue binding the courts through rigid rules of court—a function certainly not legislative in its nature.

> Why (then) should the uninitiated define the technique and select the 'tools and machinery' for the operation of our courts, by determining the methods under which these tribunals shall be administered and prescribing the rules governing the practice and procedure therein?[807]

Practicing attorneys well know that the statutes of most states, and of Louisiana in particular, are fairly cluttered with legislative acts rigidly providing how a suit must be brought, the form which the judge must employ in rendering his decision, how and when an appeal must be applied for, what cases shall be "preference" ones, et cetera. The administration of justice, it is submitted, is hampered as much by having the hands of the judiciary thus tied as by any other one factor.

The recognition of the lack of wisdom of legislative "rule making" has come slowly in America. Only in Michigan is the Supreme Court constitutionally vested with broad rule making powers.[808] However, in Washington such a power has been vested in the courts by legislative act,[809] the constitutionality of which has been upheld.[810] In Rhode Island, the General Assembly in 1929 adopted the judicial council's recommendation to vest this power in the courts.[811] In Wisconsin, also, the legislature has vested the "rule making" power in the Supreme Court.[812] In Connecticut, the council succeeded in securing a partial recognition of judicial rule making, the judges of the superior courts being permitted to make rules for appeals and writs of error.[813] A partial recognition of judicial rule making has also been made in the

---

[807] *Third Report of the Judicial Council of California, op. cit.*, p. 81.
[808] *Constitution of Michigan*, Art. VII, Sec. 5.
[809] *Laws of 1925*, ch. 118, p. 187.
[810] *State ex rel Foster—Wyman Lumber Co. et al. vs. Superior Court for Kings County et al.*, 267 Pacific 770.
[811] *Fourth Report of the Judicial Council of Rhode Island, op. cit.*, p. 10; *Public Laws of 1929*, ch. 1618.
[812] *Laws of 1929*, ch. 404; *Journal of American Judicature Society*, Vol. XIII, No. 3, pp. 71 and 72. The constitutionality of this act has been upheld. *Ibid.*, Vol. XV, No. 1, p. 31.
[813] *Second Report of the Judicial Council of Connecticut, op. cit.*, pp. 86 and 87; *Public Acts of 1929*, ch. 301, Sec. 12.

constitutions of Texas,[814] Maryland,[815] Indiana,[816] Nebraska,[817] and Georgia.[818]

In Kansas, the Judicial Council has secured an informal opinion from its Supreme Court that the judiciary department could exercise such a power of rule making to the extent that the legislature had not provided rules for inferior courts.[819] A similar principle has been intimated by the highest state court in Florida and Minnesota.[820] The council in Kansas, strengthened by this expression on the part of the Kansas Supreme Court and by the concurrence of the state bar, has advocated that the rule making power be *fully* vested in the Supreme Court.[821] And the councils in California, North Carolina and Ohio have made similar recommendations.[822]

It is strongly urged that both theory and fact demonstrate the wisdom of vesting "rule making" power in a judicial organ. Such an organ may be patterned after the English Rules Committee, or it may be the Supreme Court, or, again, it may be a judicial council. The important thing is the recognition that this is properly a judicial function.

THE INCORPORATED BAR

The bar of a state or nation occupies a position not analogous to that of any of the other professions. The maintenance of that position is of prime interest not only to the bar itself but to the public generally. If we accept that a regime of law is essential to the peace and happiness of individuals, then it must follow that trained exponents of the system of law are the first line of defense for that bulwark of security. Performing, as it does, quasi-public functions, and trusted with the "life, liberty and property" of individuals, the bar must be placed on a high plane of honesty and efficiency. The continuance of these ideals has been sorely threatened as the complexities of civilization have developed.

---

[814] *Constitution of Texas*, Art. V, Sec. 25.
[815] *Constitution of Maryland*, Art. IV, Sec. 18.
[816] *Constitution of Indiana*, Art. VII, Sec. 20.
[817] *Constitution of Nebraska*, Art. V, Sec. 25.
[818] *Constitution of Georgia*, Art. VI, Sec. II, par. 5 and 9.
[819] *First Report of the Judicial Council of Kansas*, December, 1927, pp. 20 and 21.
[820] *Idem. State ex rel Moody et al vs. Call*, 39 Florida 304, 22 Southern 266 and 268, decided April 27, 1897. *Smith vs. Valentine*, 19 Minnesota Reports 452 (p. 393 of Gilfillan Edition), decided in 1852.
[821] *Third Report of the Judicial Council of Kansas*, December, 1929, p. 17.
[822] *Third Report of the Judicial Council of California, op. cit.*, p. 81.
Third Report of the North Carolina Judicial Conference, 1931, p. 3.
First Report of the Judicial Council of Ohio, op. cit., pp. 14 and 24.

The qualifications which should be required for membership are best known and determined by the body most familiar with them—the bar itself. And the need for, and administration of, disciplinary measures are properly matters for the bar itself. In recognition of these principles, there has been a movement of late for incorporating the bar associations and thus enable them to bring about these ends.

The American Judicature Society and the American Bar Association have been prime movers in this reform. Both organizations have formulated "Model Bar Acts" for the assistance of those states which might desire to incorporate its bar.[823] These model acts differ slightly as to the details of organization. Both, however, provide in substance that the incorporated bar shall have the power to determine the qualifications for practice and to examine the candidates, to formulate and enforce rules of professional conduct, and to discipline or disbar.[824] But both provide that the Supreme Court shall have a limited power of review or revision.[825]

There is a difference in the provisions for the initial composition. The proposal of the American Judicature Society is that the *first* board of directors shall be appointed by the Governor from among the present or past officers of the existing unincorporated association, while that of the American Bar Association would have the clerk of the Supreme Court, with two assistants, serve as an election and canvassing board to call an initial meeting at which meeting the initial board would be chosen.[826]

Nine states have incorporated their respective bar associations,[827] and in several others the legislatures are be-

[823] Rhoda V. Lewis, Ed., *State Bar Acts Annotated*, 1931.
The American Judicature Society's Bar Organization Act, *ibid.*, pp. 7-19, reprinted from *Journal of the American Judicature Society*, Vol. II, No. 4.
The Conference of Bar Association Delegates' Model Act, *State Bar Acts Annotated, op. cit.*, pp. 20-25.

[824] *Cf.* The model acts, *ibid.*, pp. 7-19, and 20-25.

[825] *Idem.*

[826] *Ibid.*, p. 10, Secs. 16 and 17 of the model act.

[827] (1) Alabama. *Acts 1923*, No. 188, p. 100, as amended by *Acts 1923*, No. 429, p. 587, and by *Acts 1927*, No. 115, p. 79; reprinted in *State Bar Acts Annotated, op. cit.*, pp. 26-39.
(2) California. *Statutes of 1927*, ch. 34, p. 38, as amended by *Statutes of 1929*, chs. 708 and 884, pp. 1256 and 1965; reprinted in *ibid.*, pp. 40-60.
(3) Idaho. *Laws of Idaho*, 1923, ch. 211, p. 343, as amended by *Laws of 1925*, ch. 89, p. 124, and by *Laws of 1929*, ch. 98, p. 159; *ibid.*, pp. 61-77.
(4) Nevada. *Statutes of 1923-1929*, ch. 18, p. 18; digested, *ibid.*, p. 78.
(5) New Mexico. *Laws of 1925*, ch. 100, p. 147, as amended by *Laws of 1927*, ch. 113, p. 318; *ibid.*, pp. 79-86.
(6) North Dakota. *Laws of 1919*, ch. 69, p. 80, as amended and re-enacted by *Laws of 1923*, ch. 134; and *Laws of 1921*, ch. 25, as amended and re-enacted by *Laws of 1923*, ch. 133; *ibid.*, pp. 87-98.
(7) Oklahoma. *Statutes of 1929*, ch. 264, p. 376; digested, *ibid.*, p. 100.
(8) Utah. Adopted in 1931. *Journal of the American Judicature Society*, Vol. XIV, No. 6, p. 188.
(9) South Dakota. *Ibid.*, pp. 188-199; also, *ibid.*, Vol. XV, No. 3, p. 70.

ing importuned to do so.[828] These adopted acts all differ in some respects. For example, in California, because of a constitutional provision as interpreted by the Supreme Court to the effect that it had exclusive jurisdiction to admit attorneys to practice, the act was amended in 1929 so as to provide that the board of directors certify to the Supreme Court those whom it examines and passes.[829] For states having similar constitutional provisions it is suggested in the Model Act of the American Bar Association to provide that the approval of the Supreme Court to the names certified to it by the board shall entitle them to practice.[830] It is submitted that such a provision would be necessary in Louisiana.

Other differences appear. In Alabama, graduates of the University of Alabama Law School are entitled to admission into the incorporated bar of that state without examination.[831] And in South Dakota such strenuous opposition was made in the legislature to the passage of a bar act that concessions made by its advocates resulted in merely a skeleton organization, with no power of discipline.[832]

The Louisiana Bar Association has considered the question of the "incorporated bar," and its attitude seems favorable to the reform. At the 1930 meeting of the association, a special committee which had been appointed to consider the matter approved an "incorporated bar" for Louisiana, although it believed a completely "self-governing bar would not be feasible in the United States."[833] It is suggested that an "incorporated bar" would be of great assistance in raising the standards of legal education and the admission to the bar, as well as in securing responsibility of the bar towards judicial nominations—ends which are considered eminently desirable.

JUDICIAL SELECTION AND TENURE

Platitudes have been uttered for years on the topics of judicial selection, tenure and compensation, and it is almost impossible to avoid a digression into terms which are purely

[828] Virginia. *State Bar Acts Annotated, op. cit.*, pp. 112-127.
Louisiana. *Report of the Louisiana State Bar Association for 1930, op. cit.*, pp. 142-149; *ibid.*, 1931, p. 145.
Rhode Island. *Fourth Report of the Judicial Council of Rhode Island, op cit.*, pp. 24 and 25.
[829] *In Re Weymann*, 92 Cal. App. 646, 268 Pacific 971; *State Bar Acts Annotated, op. cit.*, p. 47.
[830] *Ibid.*, p. 23.
[831] *Ibid.*, p. 33, Sec. 7 of the act.
[832] *Journal of the American Judicature Society*, Vol. XIV, No. 6, pp. 188-199.
[833] *Report of the Louisiana State Bar Association for 1930, op. cit.*, pp. 142-149.

relative. All agree that fair, impartial and competent judges should be selected; none deny that good judges should be retained; and none begrudge compensation necessary to secure such a judge. But after these elemental statements there comes a deluge of conflicting opinions.[834] Some states have an appointive judiciary, following the lead of England and the Federal Government. The great majority elect their judges. And the judicial terms vary almost from one state to another.[835] The arguments both pro and con on the merits and demerits of the elective and appointive systems are time worn and well known. In Louisiana, as early as the Constitutional Convention of 1845, for example, the proponents of each system based their respective advocacy on arguments which are not yet settled.[836]

However, among the most novel of the recent proposals for judicial selection is that by Harold J. Laski.[837] Mr. Laski would have judges appointed by the Governor, assisted by a committee of judges of the Supreme Court, the Attorney General and the President of the State Bar, to be confirmed by the Senate.[838] Coupled with this proposal, he would have a permanent tenure for judges, with compulsory retirement at the age of seventy. Promotions would be internally and from a list of three submitted by the committee.[839]

Another novel plan, and one reflecting a compromise between the elective and the appointive systems, is that advocated by the Cleveland Bar Association.[840] Under this plan the Chief Justice of the Supreme Court would be elective but all other judges would be appointive. The associate judges of the Supreme Court would be appointed by the Governor with the consent of two-thirds of the Senate or the approval of a judicial council selected by the Senate. All other appellate judges would be appointed by the Chief Justice, with the consent of a majority of his associate justices. All inferior judges would be appointed by the Chief Justice, with the approval of the appellate judges of the respective dis-

[834] *Journal of American Judicature Society*, Vol. XV, No. 2, pp. 38-41; and *ibid.*, Vol. XV, No. 3, pp. 76-78.
[835] Clarence N. Callender, *American Courts, Their Organization and Procedure* (New York—1927), pp. 17-35, *passim*.
[836] *Official Reports of the Debates in the Louisiana Convention, 1844-1845*, pp. 741-788, *passim*.
[837] *Michigan Law Review*, April, 1926, Vol. XXIV, No. 6, pp. 529-543.
[838] *Idem*.
[839] *Idem*.
[840] *Journal of the American Judicature Society*, Vol. X, No. 6, p. 177.

tricts to be served by the inferior judges.[841] It should be noted, however, that this plan suggested short terms of only six or eight years for all judges.[842]

These questions have been discussed among the bench and bar of Louisiana, in addition to the consideration given to the conflicting principles by the various constitutional conventions which have been held in Louisiana. The plan of having the Supreme Court and inferior judges appointed by the Governor from a list of names submitted by the Supreme Court was advocated in the 1915 meeting of the State Bar Association.[843] Life tenure for appellate and Supreme Court judges was urged at that same meeting.[844] The unique provisions of the "Spencer Plan," formally sponsored by the association, providing a method of selection and tenure, must be considered with this discussion.[845] Under this plan, at intervals of 12 years the voters would decide on continuance of a judge in office, and the incumbent's name would alone appear on the ballot. A majority of those voting for Governor would have been require to depose a judge. Only if this was done would there be a competitive election. Vacancies in the Supreme Court during tenure would have been filled by executive appointment from a list of five names as designated by a majority of the remaining justices, subject to confirmation by the Senate. For the courts of appeal or district courts, vacancies would have been similarly filled but from a list of from three to five as designated by the Supreme Judicial Council.

Of recent years, however, the attention of the bar of Louisiana has been focused less on plans of selection or tenure than on structural matters. Yet criticism of the evils attendant to an elective system has not ceased. Disregarding for the moment present expediency, the desirability of a compromise method of having the initial judges elected for tenures of, say, twelve years, with an election held at those intervals at which no other candidates would be offered, is suggested. The sole matter to be voted upon at *that* election would be the continuance in office of the incumbent. Further, a majority of those voting for Governor would be necessary to

[841] *Idem.*
[842] *Idem.*
[843] *Report of the Louisiana Bar Association for 1915*, Vol. 16, pp. 247-256.
[844] *Ibid.*, pp. 198-209.
[845] *Journal of the American Judicature Society*, Vol. V, No. 1, pp. 19-25.

depose an incumbent. And should a judicial council be created, to function as its advocates hope, the initial selection of those judges safely could be confided to the council.

STRUCTURAL AND JURISDICTIONAL REORGANIZATION

In general, there are three types of courts—a highest state court, intermediate appellate courts having separate judges, and courts of general trial jurisdiction. Diversifications, such as in New York and Illinois,[846] are the exception. Yet such a bare outline can only begin a discussion of judicial structure and possible reorganization.

It has been the common experience that the appellate courts, and particularly the highest state courts, have been flooded with judicial work.[847] And methods for relief have been either to increase the number of courts or judges, or steadily to transfer jurisdiction from the highest state courts to the intermediate appellate ones.

Assuming that a state has been able to work out a system of selection of judges so as to secure and retain "fair, impartial and competent" judges, it is difficult to see any good reason why there should be *any* appeal *of right* to a state supreme court. With trial and intermediate appellate judges of this calibre it would appear that a supreme court should perform only supervisory and revisionary functions and then only under writs granted by it. For if justice is only to be meted out by having the number of hearings as the dominant factor, then, as a *reductio ad absurbum,* why draw the line at two or three appeals? At least why burden a supreme court with the review of questions of facts?[848]

The abolition of appeals of right to the Supreme Court of Louisiana, save in exceptional cases, was commended before the State Bar Association in 1929.[849] Such a plan had been proposed in 1910 but rejected by the Bar Association at that time.[850] It is interesting to note that the present Chief Justice of the Louisiana Supreme Court has stated that the

[846] Trial Judges serve on intermediate appellate courts.
Constitution of New York, Art. VI, Sec. 2.
Constitution of Illinois, Art. IV, Sec. 11.
[847] *Supra,* p. 108, as to Louisiana.
[848] In Texas, for example, the decisions on facts by the intermediate court of civil appeals are conclusive. *Constitution of Texas,* Art. V, Sec. 6.
[849] *Report of the Louisiana State Bar Association for 1929, op. cit.,* p. 50.
[850] *Idem.*

justices of this court unanimously approve confining its jurisdiction to questions of law alone, with all cases by their nature appealable to the court to go first to the intermediate courts of appeal, unless a pure question of law was presented. These cases would then be reviewable by the Supreme Court on questions of law alone and only under writs issued by it.[851]

A novel proposed judicial structure for Louisiana was suggested in 1928 by the then Governor-Elect, now Senator, Huey P. Long.[852] Senator Long would have abolished all intermediate courts of appeal.[853] He would have increased the Supreme Court to fifteen judges, to sit in three divisions of five each, with rehearings to be heard by the court *en banc* if the application be based upon contentions that the decision of a division was contrary to the established jurisprudence.[854] A division would "go on circuit" to each of the five largest cities in the state twice a year.[855] The court would have a very low monetary minimum.[856] He would have created a Court of Criminal Appeals to hear appeals on questions of fact in all criminal cases tried by a judge alone and without a jury.[857] House Bill No. 151, introduced at the 1928 session by Mr. Allen J. Ellender, proposed amendments to the judicial provisions of the constitution.[858] Among other changes, the proposed amendments would have increased the monetary minimum of the Supreme Court to $5000, increased the bench of the courts of appeal to five judges, and would have established a court of criminal appeals. This latter court would have been composed of three judges and, aside from a review under writs by the Supreme Court, its decisions would have been final. This bill, after slight change, was passed by the House and sent to the Senate,[859] where, after various amendments, it failed to receive the necessary two-thirds vote.[860]

The suggestions which have generally been made by the Louisiana bar, however, have been to increase the monetary

[851] Chief Justice Charles A. O'Neill, *ibid.*, 1930, pp. 43-46.
[852] *Ibid.*, 1927-1928, pp. 79-94.
[853] *Ibid.*, p. 88.
[854] *Ibid.*, pp. 88, 89, 91 and 92.
[855] *Ibid.*, pp. 92 and 93.
[856] *Ibid.*, pp. 87 and 88.
[857] *Ibid.*, pp. 93 and 94.
[858] *Official Journal of the Proceedings of the House of Representatives of the State of Louisiana*, Regular Session, 1928, pp. 276-284.
[859] *Calendar of the House of Representatives of the State of Louisiana*, Regular Session, 1928, p. 60.
[860] *Calendar of the Senate of the State of Louisiana*, Regular Session, 1928, p. 197.

minimum of the Supreme Court and the number of intermediate courts of appeal or judges thereof.[861] In my opinion either method is but a makeshift one, and would only temporarily alleviate the congestion. A unified and elastic judiciary is needed. It is particularly suggested that the size and jurisdiction of a supreme court should not be rigidly fixed in the organic law but that flexibility in these matters should be permitted within constitutional restrictions, such as limiting the jurisdiction to questions of law alone and prohibiting the ousting of an incumbent, or decreasing his pay, by legislative action. If inferior courts are to be constitutionally established, rather than left to legislative discretion, the principle of flexibility should be incorporated.

MISCELLANEOUS REFORMS

Under this heading there shall be, of necessity, no strict order of treatment. Rather, shall scattered suggestions or comment be made. The almost limitless bounds of the subject of this chapter do not admit of a single comprehensive approach.

A few of the states, particularly Ohio[862] and Virginia,[863] have provisions in their constitutions for the creation of special "commissions" to aid in clearing the dockets of their highest state court. It is true that Louisiana has made some provision for this end,[864] but differently and not as full in possibilities.

As the retirement of judges with compensation, after reaching a certain age and having had a certain length of service, seems a correct policy, it is suggested that by lowering the retirement age for judges of a supreme court and providing for their utilization in part time work on such special commissions, a desired relief for a congested docket could be had; and for these cases there would, hence, be competent and trained judges who are not yet ready for the judicial "shelf" but who deserve a rest from the tedious duties of a full time judge.[865]

[861] *Report of the Louisiana Bar Association for 1915, op cit.*, pp. 198-208; *ibid.*, 1927-1928, pp. 30 and 32; *ibid.*, 1929, pp. 49, 50 and 61.

[862] *Constitution of Ohio*, Art. IV, Sec. 22.

[863] *Constitution of Virginia*, Art. VI, Sec. 89.

[864] *Constitution*, Art. VII, Sec. 5.

[865] In Maine, provision is made by legislative act for the utilization of retired justices of the Supreme Judicial Court. *Revised Statutes*, ch. 82, as amended by *Public Laws of 1929*, ch. 141. And in Virginia the legislature may provide for utilizing retired judges for part time work. *Constitution of Virginia*, Art. VI, Sec. 102, as amended June 19, 1931.

The experience in New York and Pennsylvania prompts the suggestion that a supreme court only be required to render written opinions when modifying or reversing a decision.[866] The experience in these states has been that this practice greatly expedites the work of the court; and with a requirement that decisions of the intermediate appellate courts be written and reported, as in Louisiana,[867] there appears no reason why the suggestion would be detrimental. If appeals are to be permitted to a supreme court from trial courts the same rule could be applied by having the trial judge prepare a written opinion, this opinion to be printed in the reports of the Supreme Court with the mere statement of affirmance by that court.

Aside from the recommendation of a "unified" judicial system for the state at large, which would no doubt follow should reforms already discussed be instituted, it is urged that for larger cities there be "unified" civil and criminal courts, with a single directing head.[868] And the "Master Calendar" plan should be of benefit in such cities.[869] In Louisiana, New Orleans and, perhaps, Shreveport are the only cities believed large enough for these suggested changes.

It is believed that justices of the peace should be abolished and their functions transferred elsewhere. In Louisiana, their trial jurisdiction could be transferred to district courts, and their committing powers to clerks of court,[870] if at all. And it is suggested that the grand jury be either abolished, as in Michigan,[871] or subject to assembly only upon the call of the trial judge or judges.[872]

---

[866] See *Third Report of the Judicial Council of California, op. cit.*, pp. 46 and 47, and *California Law Review*, Vol. 18, 1929-1930, p. 491, for beneficial operation in New York and comparison of work performed. *Second Report of the Judicial Council of California, op. cit.*, pp. 59-62.

[867] *Constitution*, Art. VII, Sec. 17.

[868] The United States District Court at Washington, D. C., and the Supreme Court for Manhattan have also adopted this plan. *Journal of the American Judicature Society*, Vol. XV, No. 6, p. 193.

[869] Note Cleveland Court of Common Pleas. *The Second Report of the California Judicial Council*, pp. 53-57; Municipal Court of Cleveland, *ibid.*, pp. 52-54; Municipal Court of Chicago, *ibid.*, p. 52; Recorders Court of the City of Detroit, *ibid.*, pp. 46-47; and The Supreme Bench of Baltimore City, *Constitution of Maryland, with amendments to January 1, 1929*, Art. IV, Secs. 27-42.

[870] It is suggested that this could be done constitutionally under the authority of *McCoy vs. Hunter*, 167 Louisiana 1052.

[871] In Michigan, grand juries have been abolished, and felonies are based upon "informations," after an accused has been "bound over" following a preliminary hearing. *Second Report of the Judicial Council of California, op. cit.*, p. 46.

For beneficial operation, see Pliny W. Marsh, "Michigan's 'One Man Grand Jury,'" *Journal of the American Judicature Society*, Vol. VIII, No. 4, pp. 121-123; also *ibid.*, Vol. IX, No. 1, p. 12.

[872] In Washington, a grand jury assembles only upon the call of a superior court. *Constitution of the State of Washington*, Art. I, Sec. 25.

It is fully realized that the suggestions which have been made are neither wholly original nor a panacea for the problems enumerated. The entire subject is so wide in its scope, and so many have been the criticisms leveled at judiciaries, that at best this discussion can but have touched the surface. It is believed, however, that the adoption of changes along the lines suggested would result in material improvement in the administration of justice.

APPENDIX "A"

Replies from questionnaires sent to certain members of the bench, the bar, and the judiciary committees of the legislature for 1928-1932.*

A. SELECTION OF JUDGES

1. APPOINTMENT
   - a. Of all judges of courts of record,[1] 11
   - b. Of only Supreme Court and appellate judges,[2] ... 1

2. BAR OR SUPREME COURT DESIGNATION OF NOMINEES,[3] 7

B. TENURE OF JUDGES FOR COURTS OF RECORD

1. SUPREME COURT AND APPELLATE JUDGES
   - a. For life,[4] 5
   - b. For fixed terms, but longer than at present,[5] 6
   - c. For present terms,[6] 6
   - d. Shorter terms than at present[7] 3

2. INFERIOR JUDGES
   - a. For life,[8] 4
   - b. For fixed terms, but longer than at present,[9] 5
   - c. For present terms,[10] 8
   - d. Shorter terms than at present,[11] 2

*Although some seventy-five questionnaires were forwarded, only twenty replies were received. Hence the data obtained is too meager for any conclusions to be drawn therefrom as to the opinions of the bench and bar on these matters of judicial reform.

---

[1] Permitting quotation were: Messrs. Percy S. Benedict, George J. Ginsberg, Chas. A. Holcombe, Fred G. Hudson, Elmo P. Lee, C. B. McClung, John D. Miller and S. L. Richey.
[2] Mr. C. E. Hardin.
[3] Permitting quotation were: Messrs. Holcombe, Hudson, Richey and George M. Wallace.
[4] Permitting quotation were: Messrs. Benedict, McClung and Judge William W. Westerfield.
[5] Permitting quotation were: Messrs. Ginsberg, Hardin, Hudson, Richey and R. Sere, Jr.
[6] Permitting quotation were: Messrs. Holcombe, Miller, M. C. Redmond and Wallace.
[7] Permitting quotation were: Messrs. Chas. B. Huson and Lee.
[8] Permitting quotation were: Messrs. Benedict, McClung and Westerfield.
[9] Permitting quotation were: Messrs. Ginsberg, Hudson, Richey and Sere.
[10] Permitting quotation were: Messrs. Hardin, Holcombe, Miller, Redmond and Wallace.
[11] Messrs. Huson and Lee.

C. JURISDICTION AND POWERS OF THE SUPREME COURT

1. CONFINE TO "LAW" ALONE,[12] 1
2. INCREASE THE MONETARY MINIMUM,[13] 3
3. EMPOWER TO RENDER "ADVISORY OPINIONS,"[14] 8

D. INTERMEDIATE APPELLATE COURTS

1. INCREASE THE NUMBER OF SUCH COURTS,[15] 7
2. INCREASE THE NUMBER OF JUDGES THEREOF,[16] 3
3. VEST WITH CRIMINAL APPELLATE JURISDICTION,[17] 2

E. JUSTICES OF THE PEACE

1. ABOLISH AND TRANSFER JURISDICTION TO DISTRICT COURTS,[18] 8
2. ABOLISH AND SUBSTITUTE PARISH COURTS,[19] 3

F. THE INCORPORATION OF THE BAR

1. FAVORING,[20] 10

G. A JUDICIAL COUNCIL

1. FAVORING,[21] 10
   a. With "rule making" power,[22] 6
   b. And with strong "supervisory" powers,[23] 5

H. THE CONSTITUTION

1. OMISSION OF "LEGISLATIVE DETAIL" WITHIN LIMITATIONS,[24] 13

---

[12] Mr. Benedict.
[13] Messrs. Benedict, Hudson and Lee.
[14] Permitting quotation were: Messrs. Ginsberg, Holcombe, Hudson, McClung and Redmond.
[15] Permitting quotation were: Messrs. Benedict, Ginsberg, Holcombe, Redmond, Richey and Wallace.
[16] Permitting quotation were: Messrs. Benedict and Hudson.
[17] Mr. Richey permitted quotation.
[18] Permitting quotation were: Messrs. Ginsberg, Holcombe, Hudson, Huson, McClung and Redmond.
[19] Mr. Richey permitted quotation.
[20] Permitting quotation were: Messrs. Benedict, but "later;" also Ginsberg, Hudson, McClung, Miller, Richey and Wallace.
[21] Permitting quotation were: Messrs. Benedict, but "advisory with Supreme Court;" also Ginsberg, Hardin, Hudson, McClung and Miller.
[22] Permitting quotation were: Messrs. Hardin, Hudson, Lee, McClung and Miller.
[23] Permitting quotation were: Messrs. Ginsberg, Hudson, McClung and Miller.
[24] Permitting quotation were: Messrs. Benedict, Ginsberg, Hudson, Huson, Lee, Miller, Redmond and Wallace.

TABLE OF CASES

Adams vs. New Orleans, Texas & Mexico Railroad, 164 Louisiana 1011, p. 103.
Albert vs. Brewer, 9 Louisiana Annual 65, p. 31.
Andrews vs. Saucier, 13 Louisiana Annual 301, p. 34.
Badeaux vs. Blake, 24 Louisiana Annual 184, p. 53.
Beaulieu vs. Furst, 2 Louisiana Annual 46, p. 27.
Bloomfield vs. Thompson, 134 Louisiana 923, p. 79.
Board of Hay Inspectors vs. Pleasants, 23 Louisiana Annual 349, p. 56.
Bouanchaud vs. D'Hebert, 21 Louisiana 138, p. 53.
Brouillette vs. Judge of the 10th District Court, 45 La. Annual 243, p. 67.
Brunner Mercantile Company vs. Rodgin, 130 Louisiana 358, p. 80.
Bunkie Brick Works vs. Police Jury, 133 Louisiana 1062, p. 78.
Byrnes et al. vs. Richardson, 165 Louisiana 1025, p. 105.
Carondelet Navigation Co. vs. Lugger, 1st., 37 Louisiana Annual 100, p. 32.
Carrere vs. The City of New Orleans, 162 Louisiana 981, p. 105.
City of Gretna vs. Rossner, 154 Louisiana 117, p. 105.
City of New Orleans vs. Lea, 14 Louisiana Annual 197, p. 34.
City of Shreveport vs. Prescott, 51 Louisiana Annual 1895, pp. 67 and 81.
Coleman, Auditor of Public Accounts, vs. Hurst, 11 Southwestern (2d) 133, p. 113.
Colt vs. O'Callaghan, 2 Louisiana Annual 189, p. 27.
Cuddy vs. Belleville Iron Works, 4 Louisiana Annual 582, p. 27.
Decklar vs. Frankenheiger, 30 Louisiana Annual 410, p. 53.
Delcombe vs. Clere, 34 Louisiana Annual 1050, p. 56.
Dennenmann & Charleton vs. Charleton, 113 Louisiana 278, p. 77.
Depew vs. Venice Drainage District, 158 Louisiana 1099, p. 105.
Downs vs. Dunn, 162 Louisiana 747, p. 104.
Fayssoux vs. Denis, 48 Louisiana 850, pp. 67 and 81.
Foley vs. Democratic Parish Committee, 138 Louisiana 220, p. 84.
Gajan vs. Patout and Burguieres, 135 Louisiana 156, p. 69.
Gray vs. Laverty, 4 Martin (Old Series) 463, p. 19.
Haynes vs. Assessor, 143 Louisiana 697, p. 84.
Hagens vs. Police Jury, 121 Louisiana 634, p. 77.
Hawley vs. Barlow, 21 Louisiana Annual 563, p. 54.
Huddleston, In Re, 106 Louisiana 594, p. 81.
House Bill No. 537, of the 38th Legislature, In Re, 113 Texas 367, 256 Southwestern 573, p. 113.
Hughes, Sheriff & Tax Collector, vs. Hicks Motor Company, 155 Louisiana 228, p. 104.
Ingersoll, In Re, 50 Louisiana Annual 748, p. 81.
Jackson vs. Ludeling, 21 Wallace 629, p. 54.
Jacobs, Sarah, vs. Levy, 12 Louisiana 410, p. 19.
Kemp vs. Ellis, 25 Louisiana Annual 253, p. 56.
Lafayette Fire Insurance Co. vs. Remmers, 29 Louisiana Annual 419, p. 54.
Lafou vs. Dufrocq, 9 Louisiana Annual 350, p. 27.
Laverty vs. Duplesis, 3 Martin (Old Series) 42, p. 18.
Lavoy vs. Toye Bros. Auto and Taxi Cab Company, 159 Louisiana 209, p. 105.
Lay vs. Succession of O'Neil, 29 Louisiana Annual 722, p. 36.

Le Seigneur et al vs. Bessan, 52 Louisiana Annual 187, p. 81.
Livingston vs. Heerman, 9 Martin (Old Series) 656, p. 25.
Lord Cecil vs. Board of Liquidators, 30 Louisiana Annual 34, p. 52.
Louisiana Bank vs. Hampton, 4 Martin (Old Series) 298, p. 19.
Louisiana Chambre & Co. vs. Cole, 30 Louisiana Annual 961, p. 53.
Louisiana Ice Co. vs. State National Bank, 32 Louisiana Annual 597, p. 66.
Louisiana Society vs. Moody, 52 Louisiana Annual 1815, p. 76.
Manouvrier, Jules, In Re, 16 Louisiana Annual 257, p. 34.
Martin vs. Ashcraft, 8 Martin (New Series) 313, p. 18.
Mayor vs. Deering, 15 Louisiana Annual 208, p. 31.
Mayor of the Town of Homer et al. vs. Brown, 117 Louisiana 425, p. 76.
McCoy vs. Hunter et al., 167 Louisiana 1032, pp. 106 and 126.
McLain, In Re, 50 Louisiana Annual 999, p. 81.
Mechanics Bank vs. Union Bank, 25 Louisiana Annual 387; 22 Law Edition 871, 89 United States Reports 297, p. 35.
Melonctan vs. Broussard, 2 Louisiana 8, p. 69.
Michel vs. Michel, 151 Louisiana 541, p. 104.
Mitchell, Ex Parte, 1 Louisiana Annual 413, p. 27.
Monroe Mercantile Co. vs. Elder, 51 Louisiana Annual 1773, p. 81.
Montserrat vs. Godet, 5 Martin (Old Series) 522, p. 19.
Newman Bros. vs. Cuney, 30 Louisiana Annual 1201, p. 53.
New Orleans Baseball Company vs. New Orleans, 118 Louisiana 228, p. 79.
New York Press Company vs. Salter, 129 Louisiana 51, p. 78.
Ogden vs. Blackman, 3 Martin (Old Series) 305, p. 18.
Parker, In Re, 118 Louisiana 471, p. 79.
Parker vs. Shropshire, 26 Louisiana Annual 37, p. 53.
Perez, In Re, 146 Louisiana 373, pp. 84 and 86.
Pizerot et al. vs. Meuillon's Heirs, 3 Martin (Old Series) 97, p. 5.
Planters Bank vs. Bass, 2 Louisiana Annual 430, p. 27.
Pullen vs. Pullen, 161 Louisiana 721, p. 103.
Riney vs. Hemenway Furniture Company, 119 Louisiana 329, p. 77.
Rooney vs. Brown, 21 Louisiana Annual 51, p. 56.
Roussel vs. Dornier, 129 Louisiana 930, p. 77.
Seghers vs. His Creditors, 10 Martin (Old Series) 54, p. 19.
Sharkey vs. Bankston, 30 Louisiana Annual 891, p. 36.
Sheridan vs. Police Jury, 145 Louisiana 403, p. 84.
Smith vs. Cumberland Telephone Company, 126 Louisiana 168, p. 81.
Smith vs. Valentine, 19 Minnesota Reports 452, 393 of Gilfillan Edition, p. 118.
Southern Liquor & Tobacco Company, In Re, 49 Louisiana Annual 1455, p. 61.
Spearman vs. Toye Bros. Auto & Taxi Cab Company, 164 Louisiana 677, p. 104.
St. Tammany Lumber Company vs. Stewart's Creditors, 134 Louisiana 374, p. 81.
State ex rel Attorney General vs. Wharton, Jack, et al., 25 Louisiana Annual 14, p. 58.
State ex rel Boutroue vs. Judge of the 3d District Court of Orleans, 30 Louisiana 415, p. 48.
State ex rel Burke vs. Sewerage & Water Company, 113 Louisiana 924, p. 80.

State ex rel Burke et al., vs. Foster, Judge, et al., 111 Louisiana 939, p. 77.
State ex rel Collins vs. Burke, 32 Louisiana Annual 1214, p. 55.
State ex rel Collins vs. Clinton, 26 Louisiana Annual 406, pp. 34 and 64.
State ex rel Collins vs. Jumel, 30 Louisiana Annual 861, p. 55.
State ex rel Davidson vs. Judges of the Court of Appeals, 37 Louisiana 109, p. 60.
State ex rel Downs vs. Towne, 21 Louisiana Annual 490, pp. 34 and 64.
State ex rel Foster-Wyman Lumber Co. et al. vs. Superior Court for Kings County et al., 267 Pacific 770, p. 117.
State ex rel Gabriel vs. Judge of 22d Judicial District Court, 33 Louisiana Annual 1227, p. 33.
State ex rel Green vs. Porter, Judge, 104 Louisiana Annual 538, p. 80.
State ex rel Groffina vs. Finnegan, 52 Louisiana Annual 694, p. 79.
State ex rel Hill vs. Judges of the Court of Appeal, 46 Louisiana Annual 1292, p. 67.
State ex rel Jaubert Bros. vs. Leche, Judge, 113 Louisiana 1, p. 80.
State ex rel Mayor of Donaldsonville, et al. vs. Judge of 22d Judicial District Court et al., 35 Louisiana Annual 637, p. 69.
State ex rel Milling vs. Louisiana Public Service Commission, 154 Louisiana 752, p. 103.
State ex rel Moody vs. Call, 39 Florida 504, 22 Southern 266, p. 118.
State ex rel Morgan, P. H., vs. Kennard, J. H., 25 Louisiana Annual 239; 92 Law edition 478, 92 United States Reports 480, pp. 56 and 106.
State ex rel Paillet vs. Board of Parole, 151 Louisiana 345, p. 104.
State ex rel Robinson vs. Dranguet, 23 Louisiana Annual 784, pp. 34 and 64.
State ex rel Rogers vs. Parsons, District Attorney, 120 Louisiana 263, p. 80.
State ex rel Ryanes vs. Gleason, Judge, 112 Louisiana 612, p. 80.
State ex rel Saint vs. Allen, 169 Louisiana 1046 and 1951; 172 Louisiana 350, pp. 12 and 106.
State ex rel Saint vs. Dowling, 167 Louisiana 907, pp. 56 and 106.
State ex rel Saint vs. Irion, 169 Louisiana 481, pp. 56 and 106.
State ex rel Sholars vs. Duggan, 51 Louisiana Annual 1482, p. 79.
State ex rel Weber, et al. vs. Skinner, Judge, 32 Louisiana Annual 1092, p. 67.
State ex rel Williams vs. Monroe et als., Judges, 51 Louisiana Annual 161, p. 80.
State vs. Adams, 8 Robinson 571, p. 67.
State vs. American Sugar Refining Company, 137 Louisiana 407, p. 83.
State vs. Anderson, 29 Louisiana Annual 774, p. 52.
State vs. Baker, 51 Louisiana Annual 1243, p. 79.
State vs. Bermudez, Judge, 14 Louisiana 478, p. 19.
State vs. Brown, 4 Louisiana Annual 505, p. 67.
State vs. Buchanan, Judge, 12 Louisiana 409, p. 20.
State vs. Cason, 20 Louisiana Annual 48, p. 34.
State vs. Charles, 14 Louisiana Annual 649, p. 33.
State vs. Charlot, 8 Robinson 529, p. 67.
State vs. Clark, 146 Louisiana 421, pp. 84 and 87.
State vs. Cullen, 168 Louisiana 976, p. 103.
State vs. Dreher, 166 Louisiana 924, p. 102.
State vs. Fagin, 135 Louisiana 497, p. 78.
State vs. Falls, Justice of Peace, 32 Louisiana Annual 553, p. 67.

State vs. Flynn, 160 Louisiana 483, pp. 77 and 103.
State vs. Fort, 2 Louisiana Annual 837, p. 67.
State vs. Fouchy, 106 Louisiana 743, p. 77.
State vs. Gallagher, 153 Louisiana 533, p. 104.
State vs. Glenn, 153 Louisiana 147, p. 104.
State vs. Goff, 106 Louisiana 270, p. 76.
State vs. Gooch, 164 Louisiana 186, p. 101.
State vs. Gregory, 21 Louisiana Annual 471, p. 56.
State vs. Jackson, 106 Louisiana 189, p. 73.
State vs. Jones, Mathews J., 8 Robinson 573, p. 18.
State vs. Judge of Court of Appeals, 33 Louisiana Annual 358, p. 67.
State vs. Judge, Division B, 52 Louisiana Annual 1275, p. 80.
State vs. Judges of 1st District Court, 113 Louisiana 654, p. 78.
State vs. Judges of 5th Judicial District, 5 Louisiana Annual 756, p. 27.
State vs. Judges of Probate for City of New Orleans, 17 Louisiana 486, p. 19.
State vs. McLane, 4 Louisiana Annual 435, p. 27.
State vs. Meiles, 117 Louisiana 655, p. 78.
State vs. Peralta, 115 Louisiana 529, p. 76.
State vs. Phillips, 27 Louisiana Annual 663, p. 52.
State vs. Price et al., 124 Louisiana 917, p. 76.
State vs. Recorders of 1st Recorder's Court, 30 Louisiana Annual 450, p. 51.
State vs. Reynolds, Judge, 8 Louisiana Annual 28, p. 27.
State vs. Rose, 29 Louisiana Annual 755, p. 34.
State vs. Ross, 14 Louisiana Annual 364, p. 34.
State vs. Ross and Rogers, 18 Louisiana Annual 340, p. 68.
State vs. Sanderson et al., 169 Louisiana 55, p. 103.
State vs. Scanlon, 52 Louisiana Annual 2058, p. 79.
State vs. Seiley, 41 Louisiana Annual 143, pp. 67 and 68.
State vs. Tolman, 106 Louisiana 662, p. 76.
State vs. Thomas et al., 12 Robinson 49, p. 18.
State vs. Thompson, 104 Louisiana 167, p. 73.
State vs. Watkins & Nelson, 21 Louisiana Annual 290, p. 56.
State vs. Wenar, 118 Louisiana 142, p. 104.
State vs. Williams, 7 Robinson 252, p. 18.
State vs. Williams, 29 Louisiana Annual 779, p. 55.
State vs. Winfield, 127 Louisiana 755, p. 78.
Stubbs vs. McGuire, 32 Louisiana 817, p. 48.
Succession of Jean Duron, 34 Louisiana Annual 585, p. 61.
Succession of Gohs, 37 Louisiana Annual 428, p. 61.
Succession of McCarthy, 2 Louisiana Annual 979, p. 26.
Succession of Whipple, 2 Louisiana Annual 236, p. 27.
Suthon vs. Houma, 46 Louisiana Annual 1561, p. 67.
Swan vs. Gayle, 21 Louisiana Annual 478, p. 50.
The Grape Shot, 19 Law Edition 651, 76 United States Reports 133, p. 36.
Town of Minden vs. Crichton, 118 Louisiana 747, p. 76.
Tremont Lumber Company vs. Police Jury, 144 Louisiana 678, p. 84.
Walker vs. Barelli, 32 Louisiana Annual 1159, p. 69.
Weymann, In Re, 92 California Appeals 646, 268 Pacific 971, p. 120.
Wunderlich vs. New Orleans Railway and Light Co., 145 Louisiana 21, pp. 84 and 85.

BIBLIOGRAPHY

Source Material

A. Constitutions and Proceedings of Constitutional Conventions.

Alabama, *The Constitution of Alabama*, 1928.

Arizona, *Constitution of the State of Arizona.*

Arkansas, *The Constitution of the State of Arkansas*, as amended through 1928.

California, *The Constitution of the State of California*, 1931.

Colorado, *Constitution of the State of Colorado*, 1926.

Connecticut, *Constitution of the State of Connecticut*, as amended and in force January 1, 1926.

Delaware, *Constitution of the State of Delaware*, 1925.

Florida, *Constitution of the State of Florida*, 1929.

Georgia, *Constitution of the State of Georgia*, of 1877, including all amendments through 1930.

Idaho, *Constitution of the State of Idaho.*

Illinois, *The Constitution of the State of Illinois*, 1929.

Indiana, *Constitution of the State of Indiana*, 1930.

Iowa, *The Constitution of the State of Iowa*, as amended to 1931.

Kansas, *Constitution of the State of Kansas*, as amended, 1931.

Kentucky, *The Constitution of Kentucky*, 1928.

Louisiana,

Constitution of 1898, official.

Constitution of 1913, official.

Constitution of 1921, official.

Journal De La Convention D'Orleans De 1811-12, Jackson, 1844.

Journal of the Convention to Form a New Constitution for the State of Louisiana, 1852, New Orleans, 1852.

Long, Huey P., compiler, *Compilation of the Constitutions of the State of Louisiana (With Amendments)*, Baton Rouge, 1930.

Official Debates of the Constitutional Convention, 1864, New Orleans, 1864.

Official Journal of the Proceedings of the Convention for Framing a Constitution for the State of Louisiana, 1868, New Orleans, 1867-1868.

Official Journal of the Proceedings of the Constitutional Convention for the State of Louisiana, 1879, New Orleans, 1879.

Official Journal of the Constitutional Convention, 1898, New Orleans, 1898.

Official Journal of the Constitutional Convention of the State of Louisiana, 1913, Baton Rouge, 1913.

Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 1921, Baton Rouge, 1921.

Official Reports of the Debates in the Louisiana Convention, 1845, Jackson and New Orleans, 1844-1845.

Thorpe, Francis Newton, compiler, *American Charters, Constitutions and Organic Laws, et cetera*, Vl. III, Washington, 1909.

Maine, *Constitution of the State of Maine*, 1925.
Maryland, *Constitution of Maryland*, amended to January 1, 1929.
Massachusetts, *Constitution of the Commonwealth of Massachusetts*, 1931.
Michigan, *Constitution of the State of Michigan*, 1929.
Minnesota, *Constitution of the State of Minnesota.*
Mississippi, *Hemingway's Annotated Code*, Bobbs-Merrill, 1927.
Missouri, *Constitution of the State of Missouri*, adopted October 30, 1875, and as amended up to 1921.
Montana, *The Constitution of Montana.*
Nebraska, *Constitution of the State of Nebraska, of 1875*, as amended 1919-1920.
Nevada, *Constitution of the United States of America and of the State of Nevada*, 1931.
New Hampshire, *The Constitution of the State of New Hampshire, as in force January 1, 1929.*
New Jersey, *Constitution of the State of New Jersey*, 1931.
New Mexico, *State Constitution of New Mexico*, as amended through 1923, from the *New Mexico Blue Book, 1923.*
New York, *The Constitution of New York, as Amended and Enforced January 1, 1931.*
North Carolina, *The Constitution of North Carolina*, 1929.
North Dakota, *North Dakota Blue Book*, 1909.
Amendments to the Constitution of North Dakota.
Ohio, *The Constitution of the State of Ohio*, 1930.
Oklahoma, *The Constitution of Oklahoma, of 1907.*
Oregon, *Constitution of Oregon, as in effect March 1, 1930.*
Pennsylvania, *Constitution of Pennsylvania*, 1930.
Rhode Island, *Constitution of the State of Rhode Island*, 1929.
South Carolina, *The Constitution of South Carolina, 1895*, 1909.
South Dakota, *Constitution-1929-State of South Dakota Annotated.*
Tennessee, *Tennessee Blue Book and Official Directory*, 1929-1930.
Texas, *Constitution of the State of Texas.*
Utah, *Constitution of the State of Utah, as Amended*, 1929.
Vermont, *Constitution of the State of Vermont*, as amended through 1924.
Virginia, *Constitution of Virginia*, as amended, 1928.
Washington, *The Constitution of the State of Washington*, 1931.
West Virginia, *The Constitution of West Virginia*, 1930.
Wisconsin, *Constitution of the State of Wisconsin*, 1930.
Wyoming, *Constitution of the State of Wyoming.*

B. STATUTES.

Alabama, *Acts*, 1923 and 1927.
California, *Statutes*, 1927 and 1929.
Connecticut, *Public Acts*, 1927 and 1929.
Delaware, *Laws*, 1923.
Idaho, *Laws*, 1923, 1925 and 1929.
Kansas, *Laws*, 1927.

Kentucky, *Acts*, 1928.
Lewis, Rhoda V., editor and annotator, *State Bar Acts Annotated*, 1931.
Louisiana,
Acts of the Legislature of Louisiana, 1812-1931.
Greiner, Meirod, compiler, *The Louisiana Digest*, Vl. 1, New Orleans, 1841.
Lislet, L. Moreau, compiler, *General Digest of the Acts of Louisiana, 1804-1827*, 2 Vls., New Orleans, 1828.
Martin, Francois Xavier, compiler, *Acts of the Legislature of Louisiana, 1804-1816*, 4 Vls., New Orleans, 1816.
Phillips, U. B., compiler, *Revised Statutes of Louisiana*, New Orleans, 1856.
Ray, John, compiler, *Digest of the Statutes of the State of Louisiana*, Vl. II, New Orleans, 1870.
Wolff, Solomon, compiler and annotator, *Laws and Statutes of the State of Louisiana, As Amended to January, 1920*, 3 Vls., Indianapolis, 1920.
Maine, *Public Laws*, 1929.
Revised Statutes.
Massachusetts, *Statutes*, 1924, 1927 and 1930.
Michigan, *Public Acts*, 1929.
Missouri, *Revised Statutes*, 1919.
Nevada, *Statutes*, 1928 and 1929.
New Mexico, *Laws*, 1925 and 1927.
North Carolina, *Public Laws*, 1925.
North Dakota, *Laws*, 1919, 1921, 1923 and 1927.
Ohio, *General Code.*
Laws, Vl. 110.
Oklahoma, *Statutes*, 1929.
Oregon, *General Laws*, 1913, 1923 and 1925.
Rhode Island, *Public Laws*, 1927 and 1929.
Sanger, George P., editor, *Public Laws of the United States of America*, of the 1st Session of the 29th Congress, 1865-1866, Boston, 1866.
Virginia, *Acts*, 1930.
Washington, *Compiled Statutes Supplement*, 1927.
Laws, 1925 and 1929.

C. Reports of Judicial Councils.

California, *First Report of the Judicial Council of California, for 1928*, 1929; and subsequent reports for 1929, 1930 and 1931.
Connecticut, *Second Report of the Judicial Council of Connecticut*, December, 1930.
Idaho, *Idaho State Bar 1930 Report of the Judicial Council of Idaho.*
Illinois, *Report of the Judicial Advisory Council of Illinois and the Judicial Advisory Council of Cook County*, January, 1931.
Kansas, *Report of the Judicial Council of Kansas*, 1927; and subsequent reports printed in 1928, 1929, 1930 and 1931.
Massachusetts, *Report of the Judicial Council of Massachusetts*, November, 1925; and subsequent reports printed in 1926, 1927, 1928, 1929, 1930.

Michigan, *First Report of the Judicial Council of Michigan*, January, 1931.

North Carolina, *Third Report of the North Carolina Judicial Conference*, January, 1931.

Ohio, *First Report of the Judicial Council of Ohio to the General Assembly of Ohio*, convening January 5, 1931.

Oregon, *Reports of the Oregon Judicial Council*, reprinted from the *Oregon Law Review*, April, 1929, and April, 1930.

Rhode Island, *Report of the Judicial Council of Rhode Island*, December, 1927; and subsequent reports printed in 1928, 1929 and 1930.

Secondary Material

A. Books.

Callender, Clarence N., *American Courts, Their Organization and Procedure*, First Edition, New York, 1927.

Dodd, Walter F., *State Government*, Second Edition, New York, 1928.

Ficklin, John Rose, *History of Reconstruction in Louisiana, through 1868*, Baltimore, 1910.

Fortier, Alcée, *A History of Louisiana*, 4 Vls., New York, 1904.

Gayarré, Charles, *History of Louisiana*, 4 Vls., New Orleans, 1903.

Lonn, Ella, *Reconstruction in Louisiana After 1868*, New York and London, 1918.

Martin, Francois Xavier, *History of Louisiana*, Howe's Edition, New Orleans, 1882.

Wallace, David D., *The South Carolina Constitution of 1895*, Columbia, 1927.

Warmoth, Henry Clay, *War Politics and Reconstruction*, New York, 1930.

B. Periodicals, et cetera.

American Bar Association, Advance Program, 1931.

California Law Review, Vl. 18, 1929-1930.

Dart, Henry Plauche, "The History of the Louisiana Supreme Court," *Louisiana Reports*, Vl. 133, 1913.

Dart, Henry Plauche, "The Legal Institutions of Louisiana," *Southern Law Quarterly*, Vl. 3, No. 4, 1918.

Dickinson, John, "A Working Theory of Sovereignty," *Political Science Quarterly*, Vl. 42, 1927.

Journal of the American Judicature Society, Vls. II through XV, 1919-1931.

Louisiana Historical Quarterly, Vl. 3, 1920.

McClendon, Justice James W., "A Review of the Judicial Council Movement," *Texas Law Review*, Vl. 9, 1930-1931.

Reports of the American Bar Association, Vl. 55, 1930.

Reports of the Louisiana State Bar Association, Vls. 16 through 31, 1915-1931.

Virginia Law Review, Vl. 16, 1929-1930.

INDEX

A

Abell: quoted, Constitution of 1864, p. 40.
Adams, St. Clair: proposed a criminal code, 1915, p. 90.
Alcaldes: elections-functions, p. 5.
Assessors: p. 8.

B

Banks, Major General Nathaniel P.: ordered election for the Convention of 1864, p. 37; and for Governor, p. 44.
Bell, Major Joseph M.: presided over Provost Court, p. 35.
Blanchard, Newton C.: President of Convention of 1913, p. 88.
Brent: quoted, Constitution of 1845, pp. 22-23; cited, p. 23.
Brown, James: with Moreau Lislet in drafting a civil and criminal code, pp. 10-11.
Burke, Walter J.: proposed a larger Supreme Court, 1919, p. 91; and the abolition of justices of the peace, p. 91.
Butler, General Ben F.: capture of New Orleans, p. 35; created Provost Court, p. 35.

C

Cabildo: established and composed, pp. 4-5; abolished and a Municipality substituted, p. 7.
Captain-General: governmental official, 1801, p. 6.
Carondelet, Baron de: his bando de buen gobierno, 1792, p. 5.
Cases: (see "Table of Cases" in the bibliography).
City Court, territorial: in lieu of County Court of New Orleans, p. 10.
City courts (exclusive of Orleans): permitted under Constitution of 1898, p. 78; under Constitution of 1921, p. 101.
Claiborne, W. C. C.: a United States Commissioner to govern the territory of Louisiana, pp. 6-7; took possession of remainder of the territory, p. 11.
Colonial-Prefect: governmental official, 1801, p. 6.
Commissary of Justice: governmental official, 1801, p. 6.
Confederacy: Louisiana seceded, p. 35; courts, pp. 35-36; the Supreme Court, p. 36.
Conference of Senior Circuit Judges: created by Chief Justice Taft, 1922, p. 111.
Conrad, C. M.: quoted, Constitution of 1845, pp. 21-22.
Constitutional Convention of 1812: called, pp. 11-12; proposals affecting judiciary, pp. 12-14.
Constitutional Convention of 1845: called, p. 20; proposals affecting judiciary, pp. 21-25.
Constitutional Convention of 1852: historical, p. 28; called, p. 28; committees, pp. 28-29, and 31; proposals affecting judiciary, pp. 28-31.
Constitutional Convention of 1864: historical, pp. 35-37; called, p. 37; composed, p. 37; committees, pp. 37 and 41; judiciary proposals, pp. 37-42; adjourned subject to the call of its President, p. 44.
Constitutional Convention of 1868: historical, pp. 44-46; called, p. 46; committees, p. 46; judiciary proposals, pp. 46-51.
Constitutional Convention of 1879: historical, pp. 58-59; committees, p. 59; judiciary proposals, pp. 59-64.
Constitutional Convention of 1898: historical, pp. 69-70; assembled, p. 70; partial roster, p. 70; committees, p. 71; judiciary proposals, pp. 71-75; protest of certain delegates, p. 75.
Constitutional Convention of 1913: historical, pp. 82-83; limitations thereon, pp. 83-84; assembled, p. 83.
Constitutional Convention of 1921: historical, pp. 90-94; assembled, p. 94; partial roster, p. 94; judiciary proposals, pp. 94-99.
Constitution of 1812: modelled from Kentucky, pp. 12, 14-15; judiciary provisions, pp. 14-15; summary, pp. 19-20.
Constitution of 1845: "democratic" nature, p. 20; judiciary provisions, pp. 21, 23-25; compared with prior one, p. 26; limitations on legislature, p. 27; effect of prior laws on judicial procedure, p. 27; summary, p. 28.
Constitution of 1852: judiciary provisions, pp. 29-31; compared with prior ones, pp. 31-32; limitations on legislature, p. 34; summary, p. 34.
Constitution of 1864: judiciary provisions, pp. 42-43; compared with prior ones, p. 43; summary, p. 44.
Constitution of 1868: judiciary provisions, pp. 47-52; compared with prior ones, p. 57; summary, p. 57.
Constitution of 1879: judiciary provisions, pp. 59-66; extreme limitations on legislative discretion, pp. 62-63; amendments, pp. 60, 63, 64 and 66; compared with prior constitutions, pp. 64-66; summary, p. 69.
Constitution of 1898: judiciary provisions, pp. 71-79; amendments, pp. 79, 84 and 88; summary, p. 82.
Constitution of 1913: legality attacked, pp. 83-84; judiciary provisions, pp. 84-88; amended, pp. 86, 87-89; summary, p. 89.
Constitution of 1921: judiciary provisions, pp. 99-103; comparison with prior ones, pp. 99-103; summary, 106.
County courts, territorial: created, p. 9; jurisdiction and powers, p. 9; abolished, p. 10; one created for New Orleans, p. 10; it abolished and city court substituted, p. 10.
Courts, colonial and territorial: alcaldes, p. 5; alcaldes de barrio, pp. 5 and 8; assessors, p. 8; Cabildo, pp. 4-5; it abolished, p. 7; City Court of New Orleans, p. 10; county courts, p. 9, and abolished, p. 10; Court of Pleas, p. 8; fueros ecclesiasticos and militar, pp. 5, 7 and 9; parish courts, in lieu of county courts, p. 10; Superior Council, pp. 1-4; Superior Court, pp. 8-10; syndics, pp. 5, 7 and 9.
Courts: (see various constitutional conventions, constitutions, particular courts, and "Orleans".)
Courts of Appeal: first appeared, under Constitution of 1879, pp. 59-64; under that of 1898 and amendments, pp. 71-72, 80-81, and 85; under that of 1921, pp. 103-104, and 105; inequality of dockets, p. 108.

Cross, T. Jones: proposed "Masters in Testimony" to determine "facts", 1919, p. 91.
Crozat, Anthony: grant to, p. 1; (see "territory".)
Cutler, King: quoted, Convention of 1864, p. 39.

D

District courts: (see various conventions and constitutions) under Constitution of 1812, pp. 16 and 27; of 1845, pp. 24, 26 and 31; of 1852, not constitutionally recognized, p. 29, but created, p. 32; during "Civil War", p. 36; under Constitution of 1864, p. 48; of 1868, pp. 48-50, 52-53; of 1879, pp. 59-60, 62, 63-64; of 1898 and amendments, pp. 78, 77-78, and 86; of 1913, see above; of 1921 and amendments, pp. 100-101, 103 and 105.
Durrell, E. H.: as President of the Convention of 1864, pp. 37 and 41; allied with "radical republicans", p. 45; but refused to reconvoke the Convention, p. 45.

F

Farragut, Admiral D. G.: capture of New Orleans, p. 35.
Florence, Ernest T.: proposal for selection of judges, 1915, pp. 90-91; for a unified trial court for the state, pp. 90-91.

G

Gleason, Walter L.: proposed that extraordinary majority be required for Supreme Court to declare an act unconstitutional, 1920, p. 91.

H

Hahn, Michael: elected Governor, 1864, p. 44; chosen Senator, p. 44.
Hart, W. O.: author of judiciary proposals in Convention of 1913, p. 88; proposed a "model judicial article" on eve of 1921 Convention, p. 92.
Howell, Rufus K.: retained as judge by the federal troops, p. 36; cited, Convention of 1864, p. 40; effort to reconvene Convention of 1864, p. 45.

J

Jefferson, President Thomas: cession of Louisiana, p. 6.
Judicial Proposals: (see the various conventions and "Judicial Reorganization".)
Just prior to Convention of 1921: no appeal of right to the Supreme Court, p. 90; life tenure, p. 90 and 122; limit Supreme Court to "law" only, p. 90; raise its monetary minimum, p. 90; a criminal code, p. 90; appointments by the Governor from list designated by the Supreme Court, pp. 91 and 122; a unified trial court for the state, p. 91; omission of legislative detail, pp. 91-92; increase bench and power of the Supreme Court, p. 91; abolish justices of the peace, p. 91; require an extraordinary majority for Supreme Court to declare an act unconstitutional, p. 91; the "Spencer Plan", pp. 92-94, 110-111.
Subsequent to Convention of 1921: Incorporation of the bar, p. 120. Judicial council, pp. 115-116. Structurally: abolish appeals of right to Supreme Court, pp. 123-124 and 90; abolish intermediate courts of appeals, p. 124; increase bench of Supreme Court and send it "on circuit", p. 124; decrease its monetary minimum, p. 124; increase its monetary minimum, pp. 124-125; create separate court for criminal appeals, p. 124.
Judicial Reorganization:
Incorporation of the bar: historical, pp. 118-119; in America, pp. 119-120.
Judicial councils: origin, pp. 110-111; development, pp. 110-111; purpose, p. 112; various methods of creation, pp. 112-113; functions and operation, pp. 113-115; suggestions, pp. 115-116.
Judicial rule making: historical, pp. 116-117; in America, pp. 117-118.
Miscellaneous: special "commissions", p. 135; utilization of retired judges, p. 135; written opinions by the Supreme Court only when - -, p. 126; "Master Calendar" plan, pp. 126, 114-115; abolish justices of the peace and in lieu - -, p. 126; abolish grand juries or - -, p. 126.
Justices of the Peace: (see various conventions and constitutions) under Constitution of 1812, p. 16; of 1845, p. 25; of 1852, pp. 30 and 31; of 1864, pp. 42-43; of 1868, pp. 47 and 50; of 1879, pp. 60, 61 and 52; of 1898, pp. 74 and 78; of 1913, see above; of 1921, pp. 100 and 101.
Juvenile courts: permitted by amendment, 1908, p. 79; changes, pp. 79 and 87; reamended, 1916, p. 87; and extended under Constitution of 1921, pp. 101-102.

K

Kellogg, William P.: Governor, 1872, p. 58.
Kruttschnitt, E. B.: President, Convention of 1898, p. 70; quoted, pp. 70-71.

L

Laski, Harold J.: proposal for selection of judges, p. 121.
Laussat: Colonial Prefect, pp. 6 and 7.
Legislative Council: created, pp. 8 and 9; lower house added, p. 10; created counties and county courts, p. 9; abolished latter and substituted parishes and parish courts, p. 10; abolished "Civil Commandants and Syndics", p. 9; created new judicial districts, p. 11; called Convention of 1812, p. 11.
Lislet, Moreau: with James Brown, in drafting a civil and criminal code, pp. 10-11.
Long, Huey P.: quoted, pp. 107-108; proposed judicial structure, p. 124.

M

MacLawrason, S.: proposed life tenure for higher judges, 1915, p. 90; urged omission of legislative detail, 1919, p. 91.
McEnery, John: Democratic candidate for Governor, 1872, p. 58.
Marbois, Barbee: as First Consul of France, ceded Louisiana to United States, p. 6.
Municipality: in lieu of the Cabildo, pp. 7-8.

N

Nicholls, Francis T.: Governor, 1876, pp. 58-59.

O

Orleans, Territory: by division from the territory of Louisiana, and composing present day State of Louisiana, p. 8.
Orleans, Courts:
City courts: one created, 1825, p. 17; changes in, pp. 17-18; under Constitution of 1879, in lieu of justices of the peace, pp. 64 and 66; of 1898, pp. 74 and 79; as amended, 1904, p. 88, and in 1918, p. 88; under Constitution of 1921, p. 102.
Civil District Court: under Constitution of 1879, pp. 64, 65 and 66; of 1898, pp. 78-79; as amended, in 1908, p. 88, and in 1916, p. 88; under Constitution of 1921, p. 102.
Commercial Court of New Orleans: created, 1839, p. 18. (Terminated with Constitution of 1845).
Courts of appeal: first appeared, under Constitution of 1879, pp. 59, 60-64, 66 and 67; under Constitution of 1898 and amendments, pp. 71-72, 80-81, 85 and 86; of 1921, pp. 103-108. (See provisions of this latter constitution as to courts of appeal generally).
Criminal Court for New Orleans: created, 1818, p. 17; reorganized, 1821, into the "Criminal Court of the First District", p. 17. (See the Constitution of 1845 for its successor).
Criminal District Court: under Constitution of 1879, pp. 65 and 66; of 1898 and amendments, pp. 74 and 79; of 1921, pp. 101 and 102.
District courts: under Constitution of 1812, pp. 16, 17-18; of 1852, pp. 32-33; closed by federal troops, p. 35; reopened, p. 36; under Constitution of 1864, p. 43; of 1868, pp. 49, 52 and 65; legislative abuse and changes thereunder, pp. 52, 54-55; under Constitution of 1879, p. 65.
Justices of the peace: under Constitution of 1812, p. 17; abolished and city court in lieu, pp. 17-18; under Constitution of 1852, pp. 32-33; of 1864, pp. 42-43; of 1868, pp. 52 and 55; city courts in lieu of, under Constitution of 1879, p. 66.
Juvenile Court of Orleans: created by amendments, 1908 and 1910, pp. 77 and 87; under Constitution of 1921, pp. 101-102.
Municipal Police courts: under Constitution of 1868, pp. 55-56; abolished and recorders courts substituted, p. 56.
Parish Court: under Constitution of 1812, pp. 17 and 18. (See "Parish courts").
Probate Court of Orleans: created, 1836, p. 18.
Recorders courts: under Constitution of 1852, pp. 32 and 33; of 1868, p. 56; of 1879, p. 66; of 1898, p. 78; and of 1921, p. 102.
Superior Criminal Court: created, 1874, p. 52; terminated with Constitution of 1879, p. 59.
Superior District Court: created, 1872, pp. 52 and 54; abolished in 1877, p. 52.

P

Packard, S. B.: defeated for Governor, 1876, pp. 58-59.
Parish courts: (see various constitutions and conventions, "Courts, colonial and territorial") under Constitution of 1812, created, p. 16; jurisdiction, p. 16; prohibited under Constitution of 1845, p. 26; reappeared under Constitution of 1868, pp. 48, 49-50, 53-54 and 57; prohibited by Constitution of 1879 and have never reappeared, p. 65.
Porter, Thomas C.: quoted, Convention of 1845, p. 24.
Provisional Court of Louisiana: established, 1862, p. 36; abolished, 1864, p. 36.
Provost Court: established, 1862, p. 35; its legality upheld, pp. 35-36; abolished, 1864, p. 37.

R

Reed: quoted, Convention of 1845, p. 22.
Riot of 1866: p. 45.

S

Separation of powers: construed, pp. 105-106.
Shepley, General G. F.: became Military Governor, p. 36; succeeded by Michael Hahn, p. 44
Spain: acquisition of New Orleans, pp. 3-4; arrival of Ulloa, p. 4; of O'Reilly, p. 4; his establishment of the Cabildo and a new government, pp. 4-5; retrocession, pp. 6 and 7.
Spencer, Walter B.: The "Spencer Plan", 1919-1921, pp. 92-94, 110-111; favorable criticism thereof, p. 94; changes before its introduction in Convention of 1921, pp. 94-95.
Stauffer: quoted, Convention of 1864, p. 39.
Sullivan: quoted, Convention of 1864, p. 39.
Superior Council: created, composition and functions, pp. 1-2; reorganized, under the Western Company, pp. 2-3; again reorganized, p. 3; abolished, p. 4.
Superior Court, territorial: created, p. 8; composed, p. 8; appointees, p. 9; jurisdiction and procedure, pp. 8-9; sent "on circuit", p. 9.
Supreme Court: (see various constitutions and conventions.)
Under Constitution of 1812: jurisdiction, pp. 14, 18-19; powers, pp. 15, 18-19; structurally, pp. 14 and 16.
Under Constitution of 1845: jurisdiction, pp. 24-25, 27, 48 and 67; powers, pp. 26-28; structurally, pp. 25-26, and 28.
Under Constitution of 1852: jurisdiction, pp. 31, 33-34, 67-68; powers, p. 34; structurally, pp. 31, 32 and 64.
Under federal occupancy: p. 36.
Under Constitution of 1864: jurisdiction, p. 43; powers, p. 43; structurally, pp. 42, 43, 64-65.
Under Constitution of 1868: jurisdiction, pp. 48 and 56, also 31-32; powers, p. 56; structurally, pp. 47-48, 49, 51-52, 64-65.
Under Constitution of 1879: jurisdiction, pp. 60, 64, 67, 68-69; powers, pp. 38, 60, 65, 66-67; structurally, pp. 59, 65-66.
Under Constitution of 1898: jurisdiction, pp. 76-77, 79-82; powers, pp. 77, 79-82; structurally, pp. 75-76, and 84.
Under Constitution of 1913: see above and "Constitution of 1913".
Under Constitution of 1921: crowded docket, p. 108; jurisdiction, pp. 100, 103-105; powers, pp. 100, 102 and 103; structurally, pp. 99-100, and 103.

T

Taliaferro, James G.: President of Convention of 1868, p. 46; additional political offices, p. 46.
Territory: (see "Orleans") grant to Crozat, p. 1; government thereunder, pp. 1-2; grant to Western Company, p. 2; government thereunder, pp. 2-3; surrender of its Charter, p. 3; ceded to Spain, pp. 3-4; government thereunder, pp. 4-5; retroceded, p. 6; government thereunder, pp. 6-7; ceded to United States, pp. 6 and 11; government thereunder as a territory, pp. 6-11; admitted as a state, p. 11.
Terry: quoted, Convention of 1864, p. 39.
Treaties: of Aix La Chapelle, p. 3; Secret Treaty of November 3, 1762, between France and Spain, pp. 3-4; Treaty of Paris, February 10, 1763, p. 4; Treaty of San Ildelfonso, p. 6; cession of Louisiana to United States, pp. 6 and 11.

W

Warmoth, Henry Clay: leadership during "reconstruction", pp. 35 and 45; impeachment, p. 58; fusion with "democrats", 1872, p. 58.
Wells, J. Madison: Lieutenant-Governor, 1864, p. 44; Governor, 1865, p. 44; re-elected, p. 45.
Western Company: upon surrender of Crozat's Charter, p. 2; appearance of inferior courts, p. 2; development of the colony, pp. 2-3; surrender of its Charter, p. 3.
Wilkinson, General James: a United States Commissioner to govern the territory, pp. 6 and 7.
Wilson: quoted, Convention of 1864, p. 40.
Wiltz, Lewis A.: Lieutenant-Governor, 1876, p. 58; President, Convention of 1879, p. 59.